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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 516

Borden, Inc.,

Petitioner,

vs.

Bob Bergland, Secretary of Agriculture,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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September 26, 1978

Table of Contents

	Page
Table of Authorities	v
I. The Opinions Delivered in the Courts Below and the Dates of the Judgments Sought to Be Reviewed	1
II. The Statutory Provision Believed to Confer Jurisdiction on This Court	2
III. The Questions Presented for Review	2
IV. Statutes and Regulations Involved	4
V. Statement of the Case	5
VI. Reasons Why the Writ Should Be Allowed	12
A. The Order Reversing This Case Offends Against the Orderly and Efficient Administration of Justice by Reversing the Prior Rulings in the Same Case on Two Major Points, in Defiance of the Doctrine of "Law of the Case"	12
B. The Court of Appeals in Reversing Its Initial Decision Is in Direct Conflict with the Court of Appeals for the District of Columbia in *Fairmont* and the Court of Appeals for the Third Circuit in *Abbotts*	15
1. The Court of Appeals for the District of Columbia Held in *Fairmont* That, in Such a Case As the Present, the Damages to Be Awarded Are the Amount of the Overpayments, Which Should Be Ascertained by the District Court	15

Page

2. The Court of Appeals for the Third Circuit Held in *Abbotts* That Damages Were to Be the Amount of the Overpayments and That Remand to the Secretary for Their Ascertainment Was Improper 17

C. In Holding That Borden's Damages Are to Be Determined by the Secretary Based on an Undefined "Evaluation of Complex Economic Relationships between Producers and Handlers" Rather than by Simply Ascertaining the Amounts of Borden's Overpayments, and by Holding That the Secretary Rather Than the District Court Must Determine Borden's Damages, the Court of Appeals Has Decided Two Important and Recurrent Issues under the Milk Marketing Act Erroneously and Contrary to Good Judicial Administration 19

1. The Parties at No Time "Stipulated" That Damages Were to Be Initially Computed in Proceedings before the Secretary, As the Secretary Improperly and Incorrectly Argued to the Court of Appeals and As the Court of Appeals Was Misled to Believe 19

2. The Order Reversing the Earlier Holding That Borden's Damages Were Its Overpayments Was Based on a Misapprehension of Basic Legal Principles 21

3. There Was No Administrative Question Requiring Reference to the Secretary ... 24

Page

D. Eight Years After the Illegal Orders Were First Imposed by the Secretary, the Orderly and Efficient Administration of Justice Demands That This Case Not Be Remanded to the Secretary to Begin the Administrative Process Anew, When the Only Genuine Issue Remaining Is the Arithmetic Computation of Borden's Overpayments 27

Conclusion 29

Appendix

A. Excerpts from relevant statutes and regulations a-1
   1. 7 U.S.C. §608c(15) a-1
   2. 7 C.F.R. §1063.89(d) a-2
   3. 7 C.F.R. §1000.6(d) a-2

B. Decision of the Court of Appeals on the initial appeal, dated November 1, 1976 and reported at 544 F.2d 312 ..... a-3

C. Transcript of oral opinion of the District Court on remand, dated March 21, 1977 ..... a-19

D. Minute entry of the District Court, dated March 23, 1977 and based on oral opinion a-23

E. Per Curiam Order of the Court of Appeals, dated April 20, 1978, reversing the District Court a-24

F. Per Curiam Order of the Court of Appeals, dated June 30, 1978, denying Petition of Borden, Inc. for Rehearing a-29

G. Excerpts from Slip Opinion in *Abbotts Dairies Division of Fairmont Foods Co.* v. *Bergland*, Nos. 77-2245, 77-2246, and 77-2247 (3rd Cir., filed August 1, 1978). a-30

Page

H. Borden's Motion for Leave to File Instanter Renewed Petition for Rehearing and for Rehearing En Banc, dated August 25, 1978 ..... a-43

I. Order of Court of Appeals, dated September 8, 1978, denying Renewed Petition of Borden, Inc. for Rehearing and for Rehearing En Banc a-48

J. Letter dated August 10, 1973 from Lee A. Monroe, counsel for Borden, Inc., to Edward Silverstein, counsel for the Secretary of Agriculture a-50

K. Letter dated September 10, 1973 from Lee A. Monroe, counsel for Borden, Inc., to Office of the Hearing Examiners, U.S. Department of Agriculture a-52

L. *In Re Borden, Inc.*, U.S. Department of Agriculture AMA Docket No. M63-3, Respondent's Response to the Judicial Officer's June 30, 1978 Decision and Order, filed August 2, 1978 and stamped "Motion Granted" by Judicial Officer a-53

TABLE OF AUTHORITIES

CASES

Page

Abbotts Dairies Division of Fairmont Foods Co. v. *Bergland*, Nos. 77-2245, 77-2246, and 77-2247 (3rd Cir. 1977, filed August 1, 1978)..... 2, 4, 12, 17, 18, 22, 23, 24, 26, 27, 30

Abbotts Dairies Division of Fairmont Foods Co. v. *Bergland*, 438 F.Supp. 629 (E.D. Pa. 1977) .. 3, 4, 9, 10, 22, 25, 27, 29

Adams v. *Mills*, 286 U.S. 397 (1937) 21

Atlantic Coast Line v. *Florida*, 295 U.S. 301 (1935)..... 23

Baltimore & Ohio R. Co. v. *Brady*, 288 U.S. 448 (1933)..... 26

Borden, Inc. v. *Butz*, 544 F.2d 312 (7th Cir. 1976) 1, 5, 6, 7, 8, 9, 10, 12, 19, 22

Chattanooga Foundry & Pipe Works v. *Atlanta*, 203 U.S. 390 (1906) 21

Fairmont Foods Co. v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971)..... 2, 4, 6, 16, 17, 22, 27, 29, 30

Far East Conference v. *United States*, 342 U.S. 570 (1952) 25

Florida East Coast Ry. Co. v. *United States*, 368 F.Supp. 1009 (M.D. Fla. 1973), *aff'd*, 417 U.S. 901 (1974) 24, 26

Great Western Tel. Co. v. *Burnham*, 162 U.S. 339 (1896)..... 14

Page

Hanover Shoe, Inc. v. *United Shoe Machinery*, 392 U.S. 481 (1968) 22

Hill v. *Trustees of Indiana University*, 537 F.2d 248 (7th Cir. 1976) 20

Illinois Central Rd. Co. v. *Mulberry Hill Coal Co.*, 238 U.S. 275 (1915) 26

L & N Railroad v. *Sloss-Sheffield Co.*, 269 U.S. 217 (1925) 21

Lewis-Simas-Jones Co. v. *Southern Pacific Co.*, 283 U.S. 654 (1931) 21

Moss v. *C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975).. 23

Otten v. *Stonewall Ins. Co.*, 538 F.2d 210 (8th Cir. 1976) 14, 15

Pennsylvania Rd. Co. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915) 26

Pennsylvania Rd. Co. v. *International Coal Mining Co.*, 230 U.S. 184 (1913) 26

Washington Gas Light Co. v. *Baker*, 188 F.2d 11 (D.C. Cir. 1950) 24

White v. *Murtha*, 377 F.2d 428 (5th Cir. 1967) . 14

Williams v. *Washington Met. Area Transit Com'n*, 415 F.2d 922 (D.C. Cir. 1968)..... 24

United States v. *Dickinson*, 476 F.2d 373 (5th Cir. 1973) 14

United States v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) 25

Zdanok v. *Glidden Company*, 327 F.2d 944 (2d Cir. 1964) 14

Page

STATUTES

Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §608c)

7 U.S.C. §608c(5) 5
7 U.S.C. §608c(15)(A) 5
7 U.S.C. §608c(15)(B) 5

28 U.S.C. §1254(1) 2

OTHER AUTHORITIES

7 C.F.R. §1000.6 5
7 C.F.R. §1063.89(d) 5

Rule 35, Rules of United States Court of Appeals for the Seventh Circuit..... 8

Rule 56(e), Federal Rules of Civil Procedure.. 8, 28, 29

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I.

THE OPINIONS DELIVERED IN THE COURTS BELOW AND THE DATES OF THE JUDGMENTS SOUGHT TO BE REVIEWED

The first decision of the Court of Appeals, dated November 1, 1976, is reported at 544 F.2d 312 and also appears in the Appendix as Ex. B. The opinion of the district court on remand has not been reported and appears in the Appendix as Ex. C. The *per curiam* Order of the Court of Appeals, reversing the district court and marked "not to be cited" was dated April 20, 1978, and is not reported. It appears in the Appendix as Ex. E. Petitioner's petition for rehearing was filed May 4, 1978. The Order denying Petitioner's petition for rehearing, dated June 30, 1978, appears in the Appendix

as Ex. F. The Order denying Petitioner's motion for leave to file *instanter* a renewed petition for rehearing and for rehearing *en banc*, dated September 8, 1978, appears in the Appendix as Ex. I.

II.

THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT

Jurisdiction of this Court is invoked under Title 28 of the United States Code §1254(1) providing for the granting of a writ of certiorari upon the petition of any party to a civil case after rendition of judgment by the Court of Appeals.

III.

THE QUESTIONS PRESENTED FOR REVIEW

A. Whether this Court should resolve the conflict that now exists between the Court of Appeals for the Seventh Circuit in this case and the Courts of Appeals for the District of Columbia in *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762, 766 (D.C. Cir. 1971), and for the Third Circuit in *Abbotts Dairies Division of Fairmont Foods Co.* v. *Bergland*, Nos. 77-2245, 77-2246, and 77-2247 (3d Cir. 1977, filed August 1, 1978), by reversing the decision below and directing that Borden's damages for overcharges imposed by the illegal orders of the Secretary of Agriculture should be the amount of the overpayments and are to be ascertained by the district court? (discussed *infra*, at pp. 15 to 18)

B. Whether the Court of Appeals has wrongfully decided recurrent and important questions as to the interpretation and administration of the Milk Marketing Act, which the Secretary has admitted "will have wide-ranging ramifications on the national milk market system"? (discussed *infra*, at pp. 3 to 4 and 19 to 29)

C. Whether it is consistent with the efficient administration of justice for the Court of Appeals, having decided on appeal that the damages recoverable for overcharges imposed by the illegal rulings of the Secretary of Agriculture were the amount of the overpayments made by Borden and were to be ascertained by the district court, then to hold on a second appeal, in disregard of the doctrine of the "law of the case" and without explication, that damages were to be determined by a vague and indefinite standard of "equity and good conscience" and were to be determined in additional hearings before the Secretary? (discussed *infra*, at pp. 12 to 15)

D. Whether it is consistent with the efficient administration of justice for the Court of Appeals, on a second appeal, to reverse two of its holdings on the prior appeal, without any explanatory opinion and by an unpublished Order which is not to be cited as precedent and which neither points out any error in the holdings on the first appeal nor explains its action in reversing them, except to cite the now-reversed district court decision in *Abbotts Dairies Division of Fairmont Foods Co.* v. *Bergland*, 438 F.Supp. 629 (E.D. Pa. 1977)? (discussed *infra*, at pp. 12 to 15)

The Importance of the Issues

The issues as to the proper administration of the statutes and orders dealing with the marketing of milk here involved are recurrent and important, having now been considered by three Courts of Appeals. 7 U.S.C. §608c gives the Secretary the authority to prescribe the minimum Order price for raw

milk which all handlers must pay and sets forth a procedure for the review of such orders if those regulated thereunder are aggrieved. As the *Fairmont* and *Abbotts* cases coupled with the present case make clear, the problem of recovering overpayments after a Milk Market Order price is found illegal is by no means of infrequent occurrence.[1]

A determination of the appropriate measure of damages and the proper forum for ascertainment of these damages are thus questions of great and immediate practical concern to the industry. As the Secretary's Brief to the Court of Appeals pointed out (p. 28):

> "The precedent involved in establishing the legal criteria for a proper damage award in this case will have wide-ranging ramifications on the national milk marketing system."

IV.

STATUTES AND REGULATIONS INVOLVED

The authority of the Secretary of Agriculture ["Secretary"] to promulgate Milk Marketing Orders derives from the Agricultural Marketing Agreement Act of 1937, 7 U.S.C.

[1]From March through August of 1974, Borden's Pekin, Illinois plant was also subjected to an invalid and discriminatory adjustment to the Order price, which the Chief Judicial Officer has recently held to be unsupported by evidence and which is closely parallel to those affecting the Des Moines plant held invalid in the present case. In the Pekin proceeding, the *same* issues as to the determination of damages are present as in this case, and the Secretary has cited the unpublished Order of Reversal in the present case as precedent for requiring "administrative hearings" as to damages. *In re Borden, Inc.*, U.S. Department of Agriculture AMA Docket No. M63-3, Decision and Order, filed June 30, 1978; Respondent's Response to the Judicial Officer's June 30, 1978 Decision and Order, filed August 2, 1978. (Appendix, Ex. L)

§608c(5)(A). The proceedings before the Secretary out of which this litigation grew were initiated in accordance with 7 U.S.C. §608c(15)(A), quoted in the Appendix (Ex. A). Damages sought are payable under 7 C.F.R. §1063.89(d), (Appendix, Ex. A), which was later contained in 7 C.F.R. §1000.6. (Appendix, Ex. A) The jurisdiction of the district court was initially invoked under 7 U.S.C. §608c(15)(B). (Appendix, Ex. A)

V.

STATEMENT OF THE CASE

On September 1, 1970, Borden closed its obsolete milk processing plant at Rock Island, Illinois, which had served the Quad Cities-Dubuque Market Area (Order No. 63, 7 C.F.R. §1063), and began using its plant at Des Moines, Iowa to serve its customers in the Quad Cities Market Area and the Des Moines Market Area (Order No. 79, 7 C.F.R. §1079) as well as four other Market Areas.[2] This resulted in more milk from the Des Moines plant being sold in the Quad Cities Area than in any other Market Area, and under the provisions of the applicable statute and Market Orders, the prices for *all* raw milk used by the Des Moines plant became subject to the price formulae prescribed by the Quad Cities Order rather than the Des Moines Order. 544 F.2d at p. 313.

By a series of three "orders" (the first promulgated on October 1, 1970), the Secretary of Agriculture professing to amend the Quad Cities Order took steps to void the effect of

[2]These included the Cedar Rapids-Iowa City Area (Order No. 70), the North Central Iowa Area (Order No. 78), the Greater Kansas City Area (Order No. 64), and the Nebraska-Western Iowa Area (Order No. 63). The Iowa Market Orders and the Quad Cities Order were consolidated into a new Iowa Order on April 1, 1977. (42 Fed. Reg. 17423)

these provisions, and eliminated Borden's 19 cents per hundredweight ("cwt.") minus "location adjustment" that would otherwise have applied to Borden under the formula set forth in the Quad Cities Order, and in addition imposed a 15 cents per cwt. plus adjustment on all milk Borden purchased. Neither adjustment affected any of Borden's competitors regulated under the Quad Cities Order, who continued to be subject to the prior provisions and to pay the same price as before. The Market Order was otherwise unchanged and its lawfulness never challenged.

No claim has ever been made by anyone else regulated under or affected by the Quad Cities Order that the Order itself and the general pricing formula it had promulgated were in any way excessive, inadequate, or otherwise invalid; and nothing in the original decision of the Court of Appeals affected the validity of the Order in general, or its continued applicability to Borden's competitors.

As the result of these three orders, the price which Borden had to pay for the milk purchased for its Des Moines plant, including that resold in the Quad Cities Area and in the other Market Areas served by the Borden plant, was increased first by 19 cents per cwt. and then by 34 cents per cwt.

The three challenged "orders" were reviewed and upheld in extended proceedings before the Secretary, and then by the district court. On appeal, the Court of Appeals reversed, *Borden* v. *Butz*, 544 F.2d 312, holding that "the three rulings of the Secretary at issue here are not in accordance with law and are invalid." 544 F.2d at 319.

Consistent with the disposition of a similar case in *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762, (D.C. Cir. 1971), the Court of Appeals in its initial decision said:

> "As to damages, Borden is entitled to recover overpayments which it made pursuant to the invalid orders. Inasmuch as the Quad Cities-Dubuque marketing order provides for payment by the market administrator to handlers out of the producer-settlement fund where claims are made pursuant to 7 U.S.C. §608c(15)(A), 7 C.F.R. §1063.89(d), we remand to the district court on the issue of damages, with direction to enter judgment for Borden in the amount ascertained after appropriate proceedings. *Fairmont, supra*, at 773." 544 F.2d at 319-20.

The Secretary made no effort to obtain a review of the Court's initial decision by motion for rehearing or by writ of *certiorari*. The ruling thus became "*law of the case*." The mandate clearly directed the district court "to ascertain plaintiff's damages" and clearly held that Borden's damages consisted of the overpayments which Borden had been compelled to make.

From October 1, 1970 to July 31, 1971 (the date Borden's plant was forced to close as the result of the three invalid and discriminatory orders), the price Borden would otherwise have been required to pay under the Quad Cities Order was raised first 19 cents and then 34 cents per cwt. It is undisputed that in all Borden paid $249,978.38 above the otherwise lawful Order price.

On remand, Borden moved, *inter alia*, for a summary judgment as to the amount of the overpayments, pointing out the evidence already in the record from which a specific and detailed computation of overpayments could mathematically be made—i.e., the handler's reports filed by Borden with the Milk Market Administrator, which set forth the quantity of milk purchased by Borden during the relevant period, including the quantity of Class I milk processed at Borden's Des Moines plant. The illegal rulings by their very terms fixed the excess amounts Borden had to pay above the other-

wise effective and valid price established under the Quad Cities Order applicable to Borden's plant: i.e., first 19 cents per cwt. and later 34 cents per cwt.

In answer to Borden's motion, the Secretary was required under Rule 56(e), Fed. R. Civ. P., to come forward with "specific facts showing that there was a genuine issue for trial." The Secretary in response filed an Opposition, with one affidavit attached. The district court correctly ruled that the response filed by the Secretary had failed to show "specific facts" raising a genuine issue as to any material matter relating to the computation of overpayments, and on the basis of the undisputed facts entered summary judgment as to damages in the amount of $249,978.38 plus interest.

The Secretary thereupon appealed, and after briefs and oral argument, the Court of Appeals reversed the judgment in a three and a quarter page *per curiam* order, with no accompanying opinion. The *per curiam* Order stated on its face, "not to be cited per Circuit Rule 35."[1]

All that the Order offered by way of explanation of its action was that

> "We now determine on this appeal that the district court prematurely ascertained plaintiff's damages."

In view of the fact that the mandate previously issued had *directed* the district court to ascertain damages "with direction to enter judgment for Borden in the amount ascertained after appropriate proceedings" (544 F.2d at 319-20) and had *defined* Borden's damages as the "overpayments which it

[1] Circuit Rule 35 provides that "orders shall not be published and opinions shall be published." The rule further provides that "Unpublished orders . . . (IV) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall not be cited or used as a precedent."

made pursuant to the invalid orders" (544 F.2d at 319), just how the carrying out of that mandate was "premature" was nowhere explained.

The Court did state, without any further explanation, that "we agree" with a recent district court decision (*Abbotts Dairies Division of Fairmont Foods Co.* v. *Bergland*, 438 F. Supp. 629 (E.D. Pa. 1977)) "as to the procedure which should follow the finding of the illegality of a milk marketing order." *Abbotts*, however, has since been reversed by the Third Circuit, undercutting the Court's reliance upon the decision. (Appendix, Ex. G)

Even at the time, however, reliance upon the district court's decision in *Abbotts* was misplaced. The Order quoted the following language as if it represented what the district court had said in *Abbotts:*

> "The determination of . . . [damages] obviously will require evaluation of complex economic relationships between producers and handlers during the time period for which damages are sought. Such matters are peculiarly within the special expertise of the Secretary."

By omitting language and substituting the bracketed word "damages", the Court distorted the purport of this passage. The omitted words are those italicized:

> "The determination of *whether Abbotts would have been able to obtain an adequate supply of milk at the proposed bracketed price and, if not, at what price an adequate supply of milk would have been available to it* obviously will require evaluation of complex economic relationships between producers and handlers during the time period for which damages are sought. Such matters are peculiarly within the special expertise of the Secretary. . . ." 438 F. Supp. at 636.

The Court of Appeals' substitution of the word "damages" for the underscored words was wholly unwarranted and completely changed the meaning of the passage. As the passage actually appeared in the *Abbotts* district court opinion, it had no relevance to the present case, since on the initial appeal the Court of Appeals had already demolished the argument that Borden could not have obtained an adequate milk supply at regular Market Order prices. The initial opinion said "[t]here is no evidence in the record that Borden would suffer in short supply." 544 F.2d at 316. The Court went on to point out:

> "In the third place, the short supply statement is contrary to the obvious economic factors. There could be no general short supply at Des Moines because of Borden's presence inasmuch as Borden's lower buying price would, according to the Secretary, not attract Des Moines producers and thus not divert suppliers away from other milk handlers in Des Moines. Instead, Borden had an assured supply from outside of the Des Moines area, was attracting outside milk into Des Moines and was alleviating the short supply at Des Moines by freeing Mid-America's supply for other Des Moines-located handlers." 544 F.2d at 317.

Thus the Court's quotation from the *Abbotts* district court opinion, once the distortion of it by the Court is corrected, should have had no relevance to any issue in the present case.

After its misquotation, the Court of Appeals said:

> "We reverse the judgment of the district court insofar as it fixes the amount of damages and remand the cause to the district court with instructions to remand it to the Secretary of Agriculture to conduct an evidentiary hearing and to render an administrative decision on the amount of the plaintiff's damages, which amount shall not be less than $84,463 nor more than $249,978.33, and in regard to which the Secretary shall determine whether interest shall be added."

Nothing was said as to the measure of damages to be applied by the Secretary. Obviously, the determination of the amount of overpayments required no "expertise"; hence the measure laid down by the prior opinion of the Court was impliedly rejected.

Borden filed a Petition for Rehearing of the Order of Reversal, but this Petition was denied by another Order reading as follows:

> "On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellee, Borden, Inc., a majority of the judges on the original panel having voted to deny the same,**
>
> IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.
>
> **Circuit Judge Robert A. Sprecher has disqualified himself from participation in the petition for rehearing."

Judge Sprecher was the only member of this panel who heard the first appeal; Judges Wood and Reynolds, who denied the petition for rehearing, had not heard the arguments on the first appeal and would not be expected to have been familiar with the voluminous facts in the initial record which provided the background for that decision.[4] Thus it was particularly inappropriate for them to sanction the overturning of the decision on the first appeal.

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[4]The Secretary's Briefs to the Court of Appeals were replete with statements unsupported by the record and with misstatements of what it did contain. These were pointed out with chapter and verse in Borden's Brief. However, as is made clear by the statements in the Order with respect to the alleged "stipulation" before the Administrative Law Judge, discussed *infra*, the Court of Appeals was obviously misled as to the actual record facts.

Subsequent to the denial of Borden's petition for rehearing, the Third Circuit, as noted above, reversed the *Abbotts* decision that was the *sole* authority relied upon by the Court of Appeals here. Even though Borden was already preparing this petition for writ of certiorari, it believed that the Court of Appeals should be made aware of this important development, and accordingly Borden promptly filed a Motion for Leave to File Instanter a Renewed Petition for Rehearing and for Rehearing En Banc, along with a copy of the Third Circuit's opinion in *Abbotts*. (Appendix, Ex. H) The Motion for Leave to File Instanter was denied by the Court of Appeals on September 8, 1978. (Appendix, Ex. I) The Court thereby implicitly reaffirmed its reliance on the reversed district court opinion in *Abbotts* and consciously and deliberately set up the conflict between the Circuits that should now be resolved by this Court.

VI.

REASONS WHY THE WRIT SHOULD BE ALLOWED

A. The Order Reversing This Case Offends Against the Orderly and Efficient Administration of Justice by Reversing the Prior Rulings in the Same Case on Two Major Points, in Defiance of the Doctrine of "Law of the Case".

The initial decision of the Court of Appeals clearly decided three matters:

1. that the orders issued by the Secretary are "not in accordance with law and are invalid";

2. that Borden was entitled to recover as its damages the "overpayments which it made pursuant to the invalid orders"; and

3. that the district court, not the Secretary, was to ascertain the amount of the overpayments "after appropriate proceedings". 544 F.2d at 319.

These decided points constituted the "law of the case," which sound judicial administration required the Court of Appeals to follow on the second appeal, especially since the Secretary neither asked for a rehearing of the first decision nor sought *certiorari*. However, the Order of Reversal on the second appeal rejected and in effect set aside points 2 and 3 above.

In its initial decision, the Court of Appeals ordered the cause remanded to the district court "on the issue of damages with direction to enter judgment for Borden in the amount ascertained after appropriate proceedings." This was a clear holding that the district court and not the Secretary was to ascertain the amount of the damages and to enter judgment. In the Order of Reversal, however, the cause was remanded to the district court with instructions to remand it to the Secretary of Agriculture to conduct an "evidentiary hearing" and to render an "administrative decision" on the amount of the plaintiff's damages. The Court stated that the ascertainment of damages would require "the evaluation of complex economic relationships between producers and handlers . . . peculiarly within the special expertise of the Secretary," even though the first decision had held that Borden's damages were to be the "overpayments which it made pursuant to the invalid orders." The Order of Reversal obviously repudiated the prior decision that Borden's damages are its overpayments, since there was otherwise no purpose for a remand to the Secretary.

The Court of Appeals' departure from its prior decision was totally unexplained. No change in facts had occurred; no compelling contrary decision of superior or even parallel authority had thrown doubt on the correctness of its prior holding; and the Court did not even assert that it had a clear conviction of error or explain of what the error consisted. The Order simply referred to the procedure followed by a district court in another Circuit in another case.

In speaking of the action of an appellate court which applied the principle of the "law of the case," this Court once said:

> "In so doing, that court has done no more than this court has always done, or than is necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal." *Great Western Tel. Co.* v. *Burnham*, 162 U.S. 339, 343-44 (1896).

Certainly there were no "unusual and compelling circumstances" mentioned by the Court here to justify a reversal of its prior holding; nor do any exist. Only a "clear conviction of error on a point of law that is certain to recur . . . will prevail over 'the law of the case' whereas 'mere doubt' will not." *Zdanok* v. *Glidden Company*, 327 F.2d 944, 953 (2d Cir. 1964) The federal appellate courts agree, "Orderly judicial procedure requires that there be an adherence to a decision upon an earlier appeal of the same case." *United States* v. *Dickinson*, 476 F.2d 373, 374 (5th Cir. 1973). They also agree that this rule is "salutary". *White* v. *Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). As the Eighth Circuit Court of Appeals reiterated just two years ago:

> "This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented in that former appeal, unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works manifest injustice. • • • While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising in specific cases." *Otten* v. *Stonewall Ins. Co.*, 538 F.2d 210, 212 (8th Cir. 1976).

The Court of Appeals, in reversing the district court in this case, clearly acted contrary to two major holdings it had made in its first opinion.[5] Doing this without explanation in a brief unpublished Order defied the sound principles of judicial administration embodied in the doctrine of the "rule of the case."

B. The Court of Appeals in Reversing Its Initial Decision Is in Direct Conflict with the Court of Appeals for the District of Columbia in *Fairmont* and the Court of Appeals for the Third Circuit in *Abbotts*.

1. The Court of Appeals for the District of Columbia Held in *Fairmont* That, in Such a Case as the Present, the Damages to Be Awarded Are the Amount of the Overpayments, Which Should Properly Be Ascertained by the District Court.

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[5] The Secretary's Brief on the second appeal repeatedly attacked the rulings on the first appeal. The Secretary devoted a section to the argument that the decision below "measured Borden's damages on the basis of an incorrect standard" (Sec. Br. 46), although the standard used was that prescribed by the Court of Appeals on the first appeal. Repeatedly, the Secretary argued that the proper measure was the "entirely different measure of recovery" employed in "restitution" cases rather than "overcharge" cases (Sec. Br. 47-48). Similarly, the Secretary argued that fixing damages by the district court, as ordered on the first appeal "violates the 'primary jurisdiction' doctrine" (Sec. Br. 19) and "that the Secretary must rule on the scope of Borden's damages in the first instance." (Sec. Br. 31)

In reply, Borden repeatedly pointed out that "the Secretary now tries to relitigate the very issues decided on the prior appeal," and "to reargue the prior appeal" (Borden's Br. pp. 14, 15) and that "this attack on the decision of this Court comes too late." (Borden's Br., p. 18). Despite the law of the case doctrine, the Court of Appeals nevertheless accepted the Secretary's arguments.

In *Fairmont* the Secretary imposed a "differential" between the prices paid by some dairies as opposed to others. The differential was held unlawful as not justified on the record. No question was raised as to the validity of the basic rates which had been promulgated, so that the amount of the overpayments imposed by the "differential" on the disfavored dairies could be easily computed. Over the Secretary's protests that calculation of damages was more complex, the Court said:

> "As to damages, we think that Fairmont is entitled to recover overpayments which it made pursuant to the invalid Order." 442 F.2d at 773.

The repudiation by the Court of Appeals in this case of the measure of damages held to be appropriate in *Fairmont* (i.e., "overpayments") creates a clear conflict between the two Circuits.

The Court in *Fairmont* further concluded, also over the protests of the Secretary:

> "In view of the ease with which payments can be made once determined, we remand to the District Court on the issue of damages, with direction to enter judgment for appellant after appropriate proceedings." 442 F.2d at 773.

Thus the Court of Appeals for the District of Columbia Circuit held that the computation of overpayments is *not* an administrative question which must first be decided by the Secretary. The Order of Reversal here is thus diametrically opposed to the decision of the District of Columbia Circuit in *Fairmont* on each of two points: the first being the measurement of damages and the second being who is to determine the amount of damages.

The ruling of the Court of Appeals for the Seventh Circuit on the first appeal in the present case—that Borden's damages were its "overpayments"—was identical to the holding in *Fairmont*. The first remand to the district court to ascertain Borden's damages "after appropriate proceedings" was identical to the remand ordered in *Fairmont*. Indeed, on the first appeal here, the Court of Appeals cited and relied upon *Fairmont*.

The Order of the Court to which this Petition is directed, however, directly conflicts with the decision in *Fairmont*. No reason whatsoever was given on the second appeal to distinguish that case. Rather, the *Fairmont* case was simply ignored by the Court in its Order of Reversal.

2. The Court of Appeals for the Third Circuit Held in *Abbotts* That Damages Were to Be the Amount of the Overpayments and That Remand to the Secretary for Their Ascertainment Was Improper.

In *Abbotts*, unlike both *Fairmont* and this case, the entire pricing mechanism of the Secretary's Order was questioned and held invalid. By contrast, in *Fairmont* and the present case, the minimum price established each month under the applicable Market Order was neither challenged nor invalidated. All that was condemned was a specific and constant adjustment or differential to the Order price which a single dairy was required to pay.

Despite the need for a more complicated inquiry to determine damages in *Abbotts*, the Third Circuit rejected the Secretary's claims that the case be remanded to him so he could, in prolonged administrative proceedings, engage in reconstructing economic history for purposes of computing damages. The Court of Appeals held simply that the dairy's damages were to be its "overpayments," measured by the

difference between the price which it was forced to pay and the price which it had proposed to the Secretary but which had been rejected. (Slip Opinion, at 11-14)

Again the Order of Reversal here is in direct conflict with *Abbotts* on the same two points: i.e., the measurement of damages and the forum for determining damages.

With respect to the Secretary's insistence that he, rather than the district court, be permitted to ascertain damages in the first instance the Third Circuit held:

> "There additionally appears to be no reason for a remand to the Secretary. Attempting to ascertain in this case the price at which Abbotts would have been able to purchase milk seems meaningless in light of the district court's statement that Abbotts continued to purchase milk at the proposed bracket price prior to the August 20, 1970, injunction. Even without this fact an inquiry into what the price of milk would have been would not likely contribute anything to the evidence since the effect of the invalid Order itself during the period in question would naturally be considerable, reducing the probative quality of any attempt at reconstructing economic history. This or related litigation has already extended over an eight year period and has received considerable judicial and administrative attention, as described earlier. At this stage we cannot view lightly the possibility of further complication and delay." Slip Opinion, at 14-15.

The Third Circuit's opinion in *Abbotts* is directly in conflict with the Court's Order here. Indeed, it would follow *a fortiori* from *Abbotts* that the Court was right in its mandate after the first appeal, setting forth the measure of damages as "overpayments," which were to be ascertained by the district court.

C. In Holding that Borden's Damages Are to Be Determined by the Secretary Based on an Undefined "Evaluation of Complex Economic Relationships between Producers and Handlers," Rather than by Simply Ascertaining the Amounts of Borden's Overpayments, and by Holding That the Secretary Rather than the District Court Must Determine Borden's Damages, the Court of Appeals Has Decided Two Important and Recurrent Issues under the Milk Marketing Act Erroneously and Contrary to Good Judicial Administration.

1. The Parties at No Time "Stipulated" That Damages Were to Be Initially Computed in Proceedings before the Secretary, As the Secretary Improperly and Incorrectly Argued to the Court of Appeals and As the Court of Appeals Was Misled to Believe.

In ordering the case remanded to the Secretary to compute damages after the second appeal, the Court of Appeals explained:

> "The record before us demonstrates that the parties had stipulated before the Administrative Law Judge the facts which were to constitute the exclusive basis for deciding the legal issues involved, but expressly deferred the submission of evidence establishing the monetary damages to which the plaintiff would be entitled, if successful, 'until the legal issues have been resolved.' "

Rarely has a single sentence contained more errors of both fact and law. There was no such "stipulation" of the parties; the statement relied upon by the Court was taken out of context from covering letters from Borden's counsel which were *dehors* the record.[6] They were improperly quoted in the Secretary's Appendix without leave of court. They were thus not before the Court of Appeals and should never have been referred to by counsel or considered by the Court under its

[6]The letters are reproduced in the Appendix (Ex. J, K).

own precedents. *Hill* v. *Trustees of Indiana University*, 537 F.2d 248, 251 (7th Cir. 1976). In any event, counsel could not, by agreement between themselves, outside the record, have bound the reviewing court as to its disposition of a case before it or dictated the forum for the computation of damages.

More basic, however, is that a reading of these letters indicates clearly that there was no agreement whatsoever as to *how* the damage issue was to be determined. Borden merely agreed that some evidence that *Borden* wanted to introduce at that time be withheld "and that the question of the refund to which Borden . . . is entitled be resolved at a later date, informally or otherwise." (App., Ex. K) Resolution of the damages question by the district court in summary judgment proceedings was completely consistent with the procedures contemplated in the letter quoted and fully appropriate. Certainly, there was no agreement that the Secretary was to determine damages in an evidentiary hearing.[7]

The procedure before the district court was completely consistent with any understanding expressed in the letters that the determination of Borden's damages would be made

[7]The only Stipulation agreed to by counsel for the Secretary and for Borden was the Stipulation filed August 13, 1973, which was part of the record below. It set forth the amount of Borden's purchases at the Des Moines plant from October, 1970 through July, 1971, and provided that the record should include "the handlers reports submitted by Borden to the Market Administrator for the relevant area and time period at issue." The documents thus agreed to by the Secretary and relied on to support Borden's motion for summary judgment below provided the information from which the amounts of Borden's overpayments could be and were computed in the district court. Additional facts as to Borden's damages such as those resulting from the forced closing of its plant were not introduced but were not relevant to the damage question once the Court limited damages to "overpayments."

after the liability issue had been determined. Indeed, this is precisely what the Court of Appeals had ordered after deciding the "legal issues." The determination was made pursuant to the Rules of Civil Procedure—on a motion for summary judgment where the Secretary had full opportunity to show the existence of any evidence rebutting that advanced by Borden. Despite the opportunity, he did not. The partially quoted letters of counsel presented absolutely no basis for the district court to be accused of acting "prematurely" when it followed step by step the mandate of the Court of Appeals.

2. The Order Reversing the Earlier Holding That Borden's Damages Were Its Overpayments Was Based on a Misapprehension of Basic Legal Principles.

The decision on the first appeal holding that Borden's damages were the amounts of its overpayments followed and was consistent with a long line of decisions of this Court.

When a party is compelled to pay more than a lawful rate, tariff, or price, the overpayment or overcharge "is a tort," *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654, 660 (1931), and one "for which the plaintiffs were entitled, as for other torts, to compensation from the wrongdoer." *Adams* v. *Mills*, 286 U.S. 397, 407 (1937). In such cases, the victim can recover "without specific proof of pecuniary loss, and . . . the measure of damages is the amount of the excess exacted." *L & N Railroad* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 236 (1925).

The principle applies in all analogous cases, such as dealing with overcharges due to illegal price-fixing in antitrust cases. *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U.S. 390 (1906). In these cases, also, the amount of the overpayments constitutes the damages:

> "Hanover proved injury and the amount of its damages . . . when it proved that United had overcharged it during the damage period and showed the amount of the overcharge. . . ." *Hanover Shoe, Inc.* v. *United Shoe Machinery*, 392 U.S. 481, 482 (1968).

Hence, *Fairmont* and the first decision in the present case were correct in stating that the damages in this case are the amount of the overpayments.

The Court of Appeals here, however, stated, "We agree with the conclusion of the court which recently decided the procedure which should follow the finding of the illegality of a milk marketing order," citing the district court decision in *Abbotts*. 438 F.Supp. at 629. *Abbotts*, however, was not an overcharge case but a "restitution" case, as the Third Circuit made clear. (Slip Opinion, at 11-14)

The Court thus confused the type of issue involved in the present case with the different type of issue discussed by the district court in *Abbotts*. The present case is one sounding in law for unlawful "overcharges," while *Abbotts* was a case for equitable restitution.

Ordinarily, in restitution cases, the exact amount of overcharges cannot be readily ascertained. But in *Abbotts*, the Third Circuit was able to find a basis for their ascertainment, and on this point overruled the district court. In so doing, the Third Circuit invalidated the procedure ordered by the district court and accepted by the Seventh Circuit here.

Restitution cases, sounding in equity rather than in law, are primarily instituted when for some reason an action at law for overcharges is inadequate or inappropriate. The typical case is one where the amount of the overpayments cannot be accurately ascertained. When an existing tariff or prescribed lawful rate is declared invalid in its entirety, no

way to prove the existence or amount of an overcharge by legal standards is normally available. The old price has been voided; and no lawful price can be shown to have been in effect during the period when the invalid price had been prescribed. In many cases no assumption can be made that the fixed price in effect prior to the promulgation of the invalid price would have continued or would under changed circumstances have been lawful. Those who claim to have been injured by an invalid and excessive general rate therefore have only one remedy—a suit for restitution, sounding in equity, based on proof of overall actual "pecuniary loss" or of the "unjust enrichment" of those receiving the overpayments. This remedy involves many factors affecting such proof which have nothing to do with the ascertainment of the amount of illegally compelled overpayments.[5]

In *Abbotts*, a Market Order had been invalidated in its entirety along with the entire mechanism by which the Order price was set. The dairy asked specifically for "restitution." Because of rapid changes in the market, it could not be assumed that the Order price in effect before the invalidated order took effect would otherwise have remained unchanged or if so would have then been valid. What the Court of Appeals therefore utilized was a price schedule that had been proposed by the dairy but never approved by the Secretary. The Court properly held that in such a restitution case "the reasonableness of the rate sought to be used as a measure must appear before restitution of an overpayment can be decided." (Slip Opinion, at 13) In support of the reasonable-

[5]Restitution cases are exemplified by *Atlantic Coast Line* v. *Florida*, 295 U.S. 301 (1935), and *Moss* v. *C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975), the two cases chiefly relied on and cited by the Secretary's Brief. See the Secretary's Brief, pp. 47 *et seq.* Both cases were distinguished by the Third Circuit in *Abbotts*. (See Slip Opinion pp. 11-13)

ness of the dairy's proposed price schedule, the Court referred to the Secretary's failure to show that an adequate supply of milk would have been unavailable at the proposed prices. (Slip Opinion, at 13-14)

In the present case, however, no need exists to ascertain the lawful price. The Quad Cities minimum price that Borden would have been required to pay, but for the illegal orders, is known. The price formula under the existing Quad Cities Order was never challenged as unreasonable, and it applied throughout the relevant period to all Borden's competitors.

In recognizing the fact that the equitable remedies supplied in restitution cases apply only where overpayments cannot be computed, the Third Circuit, in accord with the many other cases, held that even in restitution cases, when the overcharges are capable of computation, the overcharges become the measure of damage: *Williams* v. *Washington Met. Area Transit Com'n*, 415 F.2d 922, 944 (D.C. Cir. 1968); *Washington Gas Light Co.* v. *Baker*, 188 F.2d 11, 23 (D.C. Cir., 1950); *Florida East Coast Ry. Co.* v. *United States*, 368 F.Supp. 1009, 1021 (M.D. Fla. 1973; 3-judge court), *aff'd*, 417 U.S. 901 (1974).

Reference back to the Secretary is not only an inappropriate remedy in an overpayment case, but, as *Abbotts* illustrates, may well be improper even in a restitution case. Its use in the present case offends logic and is contrary to sound principles of judicial administration.

3. There Was No Administrative Question Requiring Reference to the Secretary.

The Secretary on the second appeal openly attacked the holding on the first appeal that the district court was to ascertain the damages by asserting that "the issuance of the

damage award by the district court absent an initial administrative decision . . . violates the 'primary jurisdiction' doctrine" (Sec. Br. 19). This is an issue which should properly have been raised only on an appeal from the first decision. Furthermore, the primary jurisdiction doctrine has no relevance to such an issue as the mere computation of overpayments.

The sole issue before the district court and the Court of Appeals—what were the amounts of Borden's overpayments?—is not one to which the assumed "expertise" of the Secretary has any relevance. Ascertainment of overpayments requires merely a simple arithmetic computation based on the amounts paid by Borden compared with what it would have paid had the illegal rulings not been made. The facts were set forth in Borden's official handler's reports filed with the Milk Market Administrator and made part of the record below. This is purely a judicial question within the conventional experience of judges; and requires no prior submission to an administrative agency.[9] The doctrine of primary or exclusive jurisdiction in administrative agencies applies only where

> "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952); quoted with approval in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64 (1956).

This Court has repeatedly held that suits for damages because of illegal agency action, where the illegality has been

[9]As pointed out earlier, even the lower court in *Abbotts* recognized that no submission would have been required had the record before it permitted the computation of the compelled overpayments. 438 F. Supp. at 636.

established, do not require submission to the administrative agency. *Pennyslvania Rd. Co.* v. *International Coal Mining Co.*, 230 U.S. 184 (1913); *Pennsylvania Rd. Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Illinois Central Rd. Co.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 282-83 (1915); *Baltimore & Ohio R. Co.* v. *Brady*, 288 U.S. 448 (1933). In the first of these cases, this Court said:

> "The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact. . . ." 230 U.S. at 197[10]

As the Third Circuit said in *Abbotts*:

> "In any event, the issues left to be decided in this case are not of the kind which are peculiarly within the expertise of the Secretary and which might otherwise justify resort to the administrative process." Slip Opinion, p. 14, n. 16

Not being required to refer the matter to the Secretary, the Court's action in doing so violates sound principles of judicial economy and administration. Assuming, as the Secretary undoubtedly will, that he is to consider all matters which he contends are appropriate to a "restitution" case, any hearing before the Secretary will be protracted. The Secretary's Briefs before the Court of Appeals demonstrate that, under his interpretation of the mandate, he will consider a multitude of issues clearly not appropriate to an overpayments case. The failure of the Court of Appeals to deny their relevance will obviously be treated as an open invitation to pursue them all.

[10]In *Florida East Coast Ry. Co.* v. *United States*, 368 F. Supp. at 1021 the Court noted that referral to the I.C.C. to make the computation of overcharges "is unnecessary and would permit plaintiffs to relitigate many of the issues which have already been disposed of herein." This language is directly pertinent to the present case.

Furthermore, as the Secretary's Brief to the Court of Appeals emphatically demonstrates, totally extraneous issues will be debated at length in any hearing he conducts. The Secretary obviously intends to burden the record in the proposed "administrative hearing" by retrying old issues and dragging in many totally extraneous ones.

D. Eight Years After the Illegal Orders Were First Imposed by the Secretary, the Orderly and Efficient Administration of Justice Demands That This Case Not Be Remanded to the Secretary to Begin the Administrative Process Anew, When the Only Genuine Issue Remaining Is the Arithmetic Computation of Borden's Overpayments.

The Order of the Court of Appeals in remanding this case to the Secretary of Agriculture for further proceedings is an affront to the efficient administration of justice. Having spent *six years* simply establishing that the orders of the Secretary were unlawful, Borden should not be forced again to run the gamut of lengthy administrative proceedings and further appeals in order to secure a resolution of the ministerial matter of ascertaining "overpayments."

Three Courts of Appeals have recognized the inefficiency and injustice of remanding to the Secretary to ascertain damages once orders affecting milk handlers have been found unlawful. In *Fairmont, supra*, the order of the Secretary challenged by Fairmont was imposed on February 4, 1965. Six years later, on February 26, 1971, when a final decision was issued by the Court of Appeals striking down the order, the Court specifically remanded to the district court to ascertain damages. Similarly, in *Abbotts, supra*, the challenged order was issued on August 20, 1969, and when the Court of Appeals finally decided the question on August 1, 1978—nine years later—the Court made clear that damages

were to be ascertained forthwith by the district court. In the present case, too, on the initial appeal, the Court of Appeals recognized that after six years of litigation, it was appropriate for the district court to calculate Borden's damages.

The practical effect of not permitting the district court to award damages after an order of the Secretary has been invalidated is apparent: it is to render illusory the possibility of any actual recovery. The prospect of a second, prolonged set of proceedings devoted to the issue of damages, in which the Secretary would again seek to offer economic justifications for his invalidated orders in order to reduce the damages awarded, would discourage and deter all but the most determined of litigants.

Like the fictional case of *Jarndyce* v. *Jarndyce* in Dickens' *Bleak House*, the present proceeding, as a result of the Court of Appeals' Order on the second appeal, has no end in sight. Eight years after the first of the illegal orders was imposed and almost two years after the orders were invalidated by the Court of Appeals, Borden is still confronted with the choice of engaging in many additional years of litigation to recover its overpayments or simply giving up.

Following the Court's mandate after the first appeal, summary judgment was the most efficient and appropriate means of concluding this litigation. The initial appeal established Borden's right to recover its overpayments. The Court of Appeals' subsequent capricious reversal of the summary judgment was not only inconsistent with the efficient administration of justice but also in defiance of Rule 56(e) of the Federal Rules of Civil Procedure. That rule requires the party opposing summary judgment to come forward with "specific facts showing there is a genuine issue for trial." Nothing in the Secretary's "Opposition" to Borden's motion

for summary judgment as to damages satisfied this requirement, and on the second appeal the Court of Appeals did not even make any pretext that the Secretary had raised any triable issue. Indeed, the Court of Appeals avoided even referring to Rule 56(e), neither stating what "specific facts" the Court believed had been adduced by the Secretary nor describing what the Court believed to be the "genuine issues for trial" shown to exist.

Under these circumstances, the Order of the Court of Appeals represented an abdication of the Court's responsibility to ensure that substantial rights of the parties are not effectively forfeited as the result of the inefficient administration of justice.

CONCLUSION

The Secretary's efforts to frustrate milk handlers' challenges to his administrative rulings through endless litigation of extraneous matters are notorious. In *Fairmont*, he unsuccessfully sought the opportunity to apply his claimed expertise in order to defeat the plaintiff's recovery of overpayments. Again in *Abbotts*, the Secretary was rebuked by the district court for having after the prior appeal "considered matters far beyond the scope of [the court's] order." 438 F.Supp. at 637.

Once overcharges, like those at issue in *Fairmont* and here, have been found unlawful by the courts, no room is left for the application of administrative expertise in calculating damages. To remand to the Secretary under such circumstances is to prolong the proceedings, to delay and possibly to defeat any ultimate recovery, and to invite subsequent appeals. The protracted and cumbersome procedure now mandated by the Court of Appeals will impose a wholly unnecessary burden on the parties and on the courts.

The proper standards and procedures for awarding damages are set forth in *Abbotts* and *Fairmont* and in the opinion of the Court below on the *initial* appeal. The conflict between the Circuits on these important issues and the injustice and inefficiency resulting from the Seventh Circuit's unexplained reversal of its own prior mandate provide a compelling need for review of the decision below.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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September 26, 1978

APPENDIX

Exhibit A

Excerpts from relevant statutes and regulations
7 U.S.C. § 608 c(15)

Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or

delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

7 C.F.R. § 1063.89 (1970)

Termination of obligations.

The provisions of this section shall apply to any obligation under this part for the payment of money.

* * *

(d) Any obligation on the part of the market administrator to pay a handler any money which such handler claims to be due him under the terms of this part shall terminate 2 years after the end of the calendar month during which the skim milk and butterfat involved in the claim were received if an underpayment is claimed, or 2 years after the end of the calendar month during which the payment (including deduction or setoff by the market administrator) was made by the handler if a refund on such payment is claimed, unless such handler, within the applicable period of time, files pursuant to section 8c(15)(A) of the Act, a petition claiming such money.

7 C.F.R. § 1000.6

Termination of obligations.

The provisions of this section shall apply to any obligation under the order for the payment of money:

* * *

(d) Unless the handler files a petition pursuant to section 8c(15)(A) of the Act and the applicable rules and regulations

(7 CFR 900.50 et seq.) within the applicable 2-year period indicated below, the obligation to the market administrator:

(1) To pay a handler any money which such handler claims to be due him under the terms of the order shall terminate 2 years after the end of the month during which the skim milk and butterfat involved in the claim were received; or

(2) To refund any payment made by a handler (including a deduction or offset by the market administrator) shall terminate 2 years after the end of the month during which payment was made by the handler.

Exhibit B

BORDEN, INC., Plaintiff-Appellant,
v.
Earl L. BUTZ, Secretary of Agriculture,
Defendant-Appellee.
No. 76-1478.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 24, 1976.
Decided Nov. 1, 1976.

Before SPRECHER and BAUER, Circuit Judges, and KUNZIG, Judge.*

SPRECHER, Circuit Judge.

This appeal concerns the validity of certain amendments to milk marketing orders by the Secretary of Agriculture under a provision of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c(5)(A).

*Honorable Robert L. Kunzig, Judge, United States Court of Claims, is sitting by designation.

I

Prior to September 1, 1970, Borden operated a milk processing plant at Rock Island, Illinois, which served the Quad Cities—Dubuque Market Area and which was regulated under the Quad Cities—Dubuque Milk Marketing Order No. 63, 7 C.F.R. Part 1063 (1970). Also prior to September 1, 1970, Borden operated another milk processing plant at Des Moines, Iowa, which was regulated under the Des Moines Milk Marketing Order No. 79, 7 C.F.R. Part 1079 (1970). This second plant served the Des Moines area, but also served the Cedar Rapids—Iowa City area (Order No. 70), the North Central Iowa area (Order No. 78), the Greater Kansas City area (Order No. 64), the Nebraska—Western Iowa area (Order No. 65) and the Quad Cities—Dubuque area (Order No. 63).

The Rock Island plant purchased its principal milk supply from Mississippi Valley Milk Producers Association and the Des Moines plant purchased its principal milk supply from Mid-America Dairymen, Inc.

On September 1, 1970, Borden discontinued bottling operations at the Rock Island plant and its fluid milk accounts in the Quad Cities—Dubuque area were thereafter served from the Borden plant at Des Moines. After September 1, the Des Moines plant's supplies of milk were purchased from Mississippi Valley.

Under the terms of Order Nos. 63 and 79, any particular plant is regulated in the market where it has the greatest distribution of milk. Consequently, upon the closing of the Rock Island plant and the assuming of its business by the Des Moines plant, the Des Moines plant became subject to the Quad Cities—Dubuque Order.

Borden's Des Moines plant was subject to the Quad Cities—Dubuque Order from September 1, 1970 through July 31,

1971, when the Des Moines plant was shut down. During that period the Class I price under the Quad Cities—Dubuque Order was 15 cents per hundredweight lower than the Class I price under the Des Moines Order.

The Quad Cities—Dubuque Order also provided that the price for Class I milk should be reduced.

> [a]t a plant located outside the marketing area and 70 miles or more, by the shortest hard-surfaced highway distance . . . from the nearer of the City Hall, Rock Island, Ill., or the Post Office, West Liberty, Iowa, by 10 cents and by an additional 1.5 cents for each 10 miles or fraction thereof that such distance exceeds 80 miles.

7 C.F.R. § 1063.52(a)(2) (1970).

Inasmuch as Borden's Des Moines plant was approximately 140 miles from the Quad Cities base point, it was entitled to a "location adjustment" of 10 cents per hundredweight plus 1.5 cents per 10 miles for the 60 miles by which 140 exceed 80 miles, or a total location adjustment of 19 cents per hundredweight, which, when added to the 15 cents price differential, resulted in Borden's Des Moines plant paying 34 cents per hundredweight less than other milk handlers located in Des Moines but subject to the Des Moines Order. However, any Des Moines plant which desired to distribute all or the greater of its milk in the Quad Cities—Dubuque area would have had exactly the same advantage in thereby transferring its plant from the operation of the Des Moines Order to the Quad Cities—Dubuque Order.

Borden had no competitive advantage over other handlers subject to the Quad Cities Order, since those handlers also paid 15 cents less than the Des Moines Order price for Class I milk and the 19 cents location adjustment was offset by the transportation costs involved in distributing milk to the Quad Cities—Dubuque area from 140 miles away in Des Moines.

Borden had no competitive advantage in the Des Moines market area since it voluntarily agreed with its producers to pay the same price paid by other Des Moines handlers for milk purchased for resale in the Des Moines area.

Under the milk marketing orders as they then existed, Borden's closing down of the Rock Island plant and supplying its Quad Cities customers from the Des Moines plant was entirely lawful and proper. Borden's mistake apparently was an economic one of deciding to purchase milk from Mississippi Valley Milk Producers Association, an independent dairy cooperative, after the changeover, instead of from Mid-America Dairymen, Inc., another independent dairy cooperative. Mid-America promptly requested the Department of Agriculture to suspend the 19 cents location adjustment.

There followed the issuance of three orders of the Secretary of Agriculture, the validity of which form the basis for this appeal:

1. *October 1, 1970, order.* On September 12, 1970, the Department of Agriculture caused to be published in the Federal Register a notice of proposed suspension of 7 C.F.R. § 1063.52(a)(2) of the Quad Cities—Dubuque Order for the months of September and October 1970. The notice did not provide an opportunity for a hearing, and no hearing was held. Borden submitted its exceptions to the proposed suspension, noting that it would only affect Borden and none of its competitors. On October 1, 1970, the Secretary issued an order suspending 7 C.F.R. § 1063.52(a)(2) for the month of October only. The order is worded in such a manner as to apply only to Borden.

2. *October 29, 1970 order.* On September 30, 1970, notice was issued, and on October 3 it was published, of a hearing

to be held on October 8 on five proposed amendments to the Quad Cities—Dubuque, Cedar Rapids—Iowa City and Des Moines marketing orders. An order was issued on October 29, effective November 1, 1970, amending the Quad Cities—Dubuque Order No. 63 by permanently eliminating the 19 cents minus location adjustment applicable to Borden's Des Moines plant and for a six-month period through April 1971, providing for a 15 cent plus location adjustment applicable to plants located within the Des Moines marketing area. The order increased Borden's price for Class I milk by 34 cents per hundredweight by amending 7 C.F.R. § 1063.52(a)(2), as follows (added language emphasized):

> At a plant located outside the marketing area *and outside the Des Moines, Iowa, marketing area* . . . and 70 miles or more, by the shortest hard-surfaced highway distance . . . from the nearer of the City Hall, Rock Island, Ill., or the Post Office, West Liberty, Iowa, subtract 10 cents and subtract an additional 1.5 cents for each 10 miles or fraction thereof that such distance exceeds 80 miles.

The October 29, 1970 order also added a new § 1063.52(a)(3) as follows:

> During the period November 1, 1970, through April 1971 at a plant located within the Des Moines, Iowa, marketing area, add any amount by which the price specified . . . is less than the applicable Class I price at the same location pursuant to . . . [Order No. 79] regulating the handling of milk in the Des Moines, Iowa, marketing area.

The October 29 order did not amend the Cedar Rapids—Iowa City or the Des Moines marketing orders. Although phrased in general terms, the order was worded so as to apply only to Borden.

3. *April 28, 1971 order.* Pursuant to notices published on April 7 and 9, 1971, hearing was held on April 13, resulting

in the issuance on April 28, 1971 of an order removing the April 1971 expiration date from § 1063.52(a)(3), so as to retain the plus 15 cents location differential.

On July 31, 1971, Borden closed its Des Moines plant and discontinued operations in the Des Moines area. Thereafter, on October 8, 1971, § 1063.52(a)(2) and (3) were again amended to change the language which had applied solely to Borden.[1]

In accordance with 7 U.S.C. § 608c(15)(A), Borden filed petitions with the Secretary of Agriculture challenging the three orders as "not in accordance with law and praying for a modification thereof." The orders were upheld in an Initial Decision filed by an Administrative Law Judge (ALJ) on March 13, 1974. Borden appealed to the Judicial Officer inasmuch as final administrative authority to decide cases under the Agricultural Marketing Agreement Act of 1937, has been delegated to the Judicial Officer. 37 Fed.Reg. 18475; 38 Fed.Reg. 10795. The Judicial Officer on August 15, 1974,

[1] 7 C.F.R. § 1063.52(a)(2) and (3) (Jan. 1, 1972):

> (2) At a plant located outside the marketing area, north of U. S. Highway No. 80, and, except as provided in subparagraph (3) of this paragraph, 70 miles or more, by the shortest hard-surfaced highway distance as determined by the market administrator, from the nearer of the City Hall, Rock Island, Ill., or the Post Office, West Liberty, Iowa, subtract 10 cents and subtract an additional 1.5 cents for each 10 miles or fraction thereof that such distance exceeds 80 miles; and
>
> (3) At a plant located in that Iowa territory beyond 70 miles from the nearer of the City Hall, Rock Island, Ill., or the Post Office, West Liberty, Iowa, and south of U. S. Highway No. 80, or within the Des Moines, Iowa, marketing area as specified in Part 1079, add any amount by which the price specified in § 1063.50(b) is exceeded by the applicable Class I price at the same location pursuant to Part 1079 regulating the handling of milk in the Des Moines, Iowa, marketing area.

adopted the Initial Decision, added some conclusions, denied the relief requested by Borden and dismissed the petitions.

In accordance with 7 U.S.C. § 608c(15)(B), Borden sought review in the district court, which on February 11, 1976, entered summary judgment on behalf of the Secretary of Agriculture. Borden has appealed that decision.

II

The Agricultural Marketing Agreement Act of 1937 as amended provides that the Secretary of Agriculture may fix minimum prices for each use classification which all handlers shall pay for milk purchased from producers or associations of producers, but "prices shall be uniform as to all handlers, subject only to adjustments for: (1) volume, market, and production differentials customarily applied by the handlers subject to such order; (2) the grade or quality of the milk purchased; and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers." 7 U.S.C. § 608c(5)(A).

[1] "The statute before us does not contain a mandate phrased in broad and permissive terms." *Zuber v. Allen*, 396 U.S. 168, 183, 90 S.Ct. 314, 323, 24 L.Ed.2d 345 (1969). The Second Circuit has noted in *Fairmont Foods Co. v. Hardin*, 143 U.S. App. D.C. 40, 442 F.2d 762, 766 (1971):

> . . . [I]t is important to keep in mind the limited scope of authority that Congress delegated to the Secretary in the field of milk marketing regulations. This is not a case where the power of an agency or officer is bounded only by the broad Congressional mandate that it be exercised in the "public interest." . . [T]he Secretary was required to operate within the narrow confines of powers expressly granted.

The Secretary is authorized to make only certain adjustments and these are to "compensate or reward the producer for providing an economic service of benefit to the handler." *Zuber, supra,* 396 U.S. at 184, 90 S.Ct. at 323. And "the permissible adjustments are limited to compensation for rendering an economic service." *Zuber, supra,* at 188, 90 S.Ct. at 325. *Fairmont, supra,* at 767. "The court must invalidate orders resting on any basis other than such economic reasons,—whether the orders are ascribable to whim, which seems unlikely; or to the response of major farm interests, which may be more likely; or merely bureaucratic error in supposing that the wisdom of experts as to what is needed in the public interest must be given dominance over the constraint of Congress." *Fairmont, supra,* at 766.

7 U.S.C. § 608c(4) requires that the Secretary issue a marketing order based upon the evidence adduced at a hearing, which in turn requires that an order be supported by substantial evidence. *Fairmont, supra,* at 767; *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 317 (3d Cir. 1968), *cert. denied,* 394 U.S. 929, 89 S.Ct. 1187, 22 L.Ed.2d 455 (1969). The evidence in the record here consists of that introduced in two hearings on October 8, 1970 and on April 13, 1971. Borden has challenged the sufficiency of the evidence at every stage of these proceedings (Judicial Officer's Decision and Order, at 63; district court complaint, paras. 35(b), 36(f) and 37(g); Borden Brief on Appeal at 20, 26).

We proceed to examine the economic justifications advanced for the increase of Borden's Class I milk price by 34 cents per hundredweight and the evidence adduced in support of such justifications.

The first economic justification was a "for Borden's own good" finding: "[I]t is not reasonable to expect producers to

continue to deliver milk to the Borden, Inc., plant while higher prices are available to them at most other regulated plants in the region, including those located in the Quad Cities—Dubuque marketing area" (October 1, 1970 order). It can be noted at the outset that Des Moines was a "deficit market" and that the only milk supply problem would have been short supply rather than a glutted market or depressed prices.

A vice president of Mid-America Dairymen, Inc., the dairy cooperative which lost the Borden business at Des Moines when the Borden Rock Island plant was shut down, testified that the Des Moines area has historically been a deficit market during the fall and winter months and that the primary purpose of a fixed price "is to bring forth an adequate supply of pure and wholesome milk." Ex. E at 24.

In the thirteen months (ending September 1, 1970) prior to the October 1, 1970 order, approximately 10% of the milk in the Des Moines area was imported from outside that area. Ex. E, attached Ex. 3, at 4. Milk was imported monthly to Des Moines, primarily from the North Central Iowa, and Cedar Rapids—Iowa City marketing areas (Ex. E at 17).

How would the presence of the Borden plant at Des Moines, but regulated under the Quad Cities order, affect the short supply of milk at Des Moines? The only testimony in the record regarding Borden's future supply of milk was that of a Borden witness who said:

> After receiving assurance from Mississippi Valley [dairy cooperative] that it could supply Borden with an adequate supply of milk, Borden decided to move its bottling operation at Rock Island to its Des Moines plant.

Ex. E at 49.

There is no evidence in the record that Borden would suffer in short supply. The only evidence of short supply generally was the testimony of the Mid-America representative:

> *[T]here is some doubt as to the availability of a milk supply* for a Quad Cities—Dubuque pool plant located in the City of Des Moines if present pricing provisions of the Quad Cities—Dubuque Order prevail.

Ex. E at 24 (emphasis added).[2]

In the first place this testimony ("some doubt") is purely speculative.[3] In the second place, if it is to be given any weight whatever, being couched in general terms it would not support the Secretary's equally speculative finding ("not reasonable to expect" adequate supply) of a short supply for Borden.

In the Initial Decision of the Administrative Law Judge, adopted by the Judicial Officer, the following appears:

> Thus the Assistant Secretary concluded in his suspension and amendment actions that the Order No. 63 Class I price, less the 19 cent location differential, would not attract a sufficient supply of milk to the Des Moines plant of petitioner [Borden]. *The Secretary did not make*

[2]This testimony was given on October 8, 1970. More than six months later the same witness testified again on April 13, 1971, and interestingly enough, he again used the words "some doubt." Ex. I at 86.

[3]In *Fairmont Foods Co. v. Hardin*, 143 U.S. App. D.C. 40, 442 F.2d 762, 772 (1971), the court said: "We can find no basis for the Secretary's findings beyond mere speculation, and therefore conclude that . . . his ground of decision . . . must fail."

> *or have cause to make such a finding for the other plants which compete with petitioner in the lower priced markets.*

Ex. 35 at 67 (emphasis added).

In the third place, the short supply statement is contrary to the obvious economic factors. There could be no general short supply at Des Moines because of Borden's presence inasmuch as Borden's lower buying price would, according to the Secretary, not attract Des Moines producers and thus not divert suppliers away from other milk handlers in Des Moines. Instead, Borden had an assured supply from outside of the Des Moines area, was attracting outside milk into Des Moines and was alleviating the short supply at Des Moines by freeing Mid-America's supply for other Des Moines—located handlers.

Finally, the only non-speculative testimony on the subject of the supply of specific Des Moines handlers came from the manager of the Beatrice Foods Company's Des Moines plant, who testified that "[w]hen our plant was receiving this minus 10 cent location differential [under the Des Moines order] we experienced no problem obtaining an adequate supply of milk," Ex. I at 163, and from the president of Anderson-Erickson Dairy Company who testified:

> Q. Do you feel you can get milk delivered to your plant at Des Moines at 10 cents lower than the price . . . currently applicable?
>
> A. I don't believe we would have too much problem.
>
> Q. You believe you would continue to get milk from your present suppliers?
>
> A. I would feel so.

Ex. I at 135.

The Secretary's decision, rendered prior to the October 29, 1970 order, actually belied the finding of inadequate supply in the October 1 order, stating:

> There is indication that additional milk supplies are being added to the Des Moines market. The total number of producers increased from 1,137 in August 1969 to 1,381 in August 1970. Total receipts of milk increased from 34.4 million pounds in August 1969 to 41.6 million pounds in August 1970.

Ex. G at 9–10.

The Secretary's three orders effectively shut down Borden's Des Moines plant and ultimately reduced Des Moines' outside supply of milk. We have searched the record in vain to find evidence supporting the first purported economic justification for the three orders—that is, inadequate supply of milk for Borden—and find none.

The second finding intended to justify the October 1 order and presumably also the other two orders provided:

> Such price disparity as between a Quad Cities order plant and a Des Moines order plant located in the Des Moines marketing area would disrupt competitive relationships among such handlers distributing milk in that market. Moreover, it would also threaten orderly marketing in several neighboring markets, such as Kansas City, where milk is distributed from the Borden, Inc., plant at Des Moines.

The Secretary then purported to remedy the alleged market disruptions by dealing with the Quad Cities—Dubuque marketing order instead of with the Des Moines order. In a similar situation, the District of Columbia Circuit said:

> Assuming that the Nebraska—Western Iowa Order is a proper vehicle for remedying market disruptions in the Eastern Colorado market, there must be substantial evidence of such disruption in order to justify the imposition of such price differentials for this purpose. Mere speculation is no warrant for deviating from a principle as paramount as that of uniform price structure within a single order, particularly where the Secretary has other techniques available.

Fairmont, supra, at 772.

Some preliminary observations are in order before considering the alleged evidentiary basis for the second justification.

[2] There was nothing unusual or improper about the fact that Borden's Des Moines plant was regulated under the Quad Cities—Dubuque marketing order. The Assistant Marketing Administrator for both the Des Moines and Quad Cities orders testified that "some of these plants do switch from market to market in their regulation." Ex. E at 19. The ALJ's Initial Decision, adopted by the Judicial Officer, found that:

> The volume of milk distributed from the Borden, Inc., plant in the Quad Cities—Dubuque, Des Moines, and Greater Kansas City markets is nearly the same for each market. . . . In this circumstance, with a relatively small change in the sales volume from the plant in the Quad Cities—Dubuque, Des Moines, or Greater Kansas City markets, regulation of the plant could shift from one to another.

Ex. 35 at 23.

Also, there was nothing unusual or improper in the fact that Borden "agreed with its producers to pay an additional amount of 15 cents per hundredweight on all milk purchased for resale in the Des Moines Market Area." ALJ Initial

Decision, adopted by the Judicial Officer, Ex. 35 at 18. The Secretary's brief in this court states (p. 9):

> It must be emphasized that the order prices set under the Act are minimum prices only. Producers need not sell their milk for these minimum prices; they can and do bargain for effective prices which are above order minimums; however, they must be paid at least the minimum prices under the order.

We now consider the evidence, if any, supporting the second economic justification. In regard to raw milk purchased for resale in Des Moines, Borden had already agreed to pay plus 15 cents per hundredweight for such milk so that no economic disruption or advantage could occur. Furthermore, if Borden even theoretically had a competitive advantage and thereby increased its Des Moines sales, the slightest increase in Des Moines sales would have resulted in Borden's selling the plurality of its Class I milk in Des Moines and automatically transferred Borden's plant to regulation under the Des Moines order, thus eliminating the advantage. Nor did Borden enjoy any competitive advantage over other milk handlers in the Quad Cities—Dubuque market inasmuch as they were all subject to the same Quad Cities order with the same location adjustments. However, when the three orders at issue here were promulgated, Borden immediately suffered a 19 cents per hundredweight economic disadvantage. If anything, the orders created, rather than tending to eliminate, disruptive competitive relationships.

Significantly, shortly after Borden shut down its Des Moines plant, the Secretary issued on August 6, 1971, an order decreasing the Des Moines price by five cents and increasing the Quad Cities price by three cents, thereby reducing the disparity between the two prices from 15 cents to seven cents. 36 Fed.Reg. 14752. This left the two prices seven

cents more "disruptive" than under Borden's voluntary 15 cent plus agreement.

In addition to the evidence adduced at the October 8, 1970 and April 13, 1971 hearings, we have examined the ALJ's Initial Decision, the Judicial Officer's "Additional Conclusions" and the Secretary's brief on appeal, as well as the three orders themselves in an attempt to find any basis upon which to support the second purported economic justification. We can find none. In fact, it is somewhat extraordinary that with a record of the volume of that before us the Secretary can point to no supportive evidence other than the expressed desires of Mid-America and several milk handlers competing with Borden that Borden be stripped of the 34 cents minus price difference. The testimony of these witnesses consisted of hortatory, conclusory and speculative opinions and predictions. On the other hand, Borden was precluded from introducing specific evidence of its transportation costs to the Quad Cities in order to justify continuance of the 19 cent minus location adjustment which was being taken from it but from no other handlers. Ex. I at 198–201.

[3,4] We agree with the *Fairmont* court that "[w]hile normally the court defers to administrative expertise, the record is so devoid of support for the Secretary's finding[s] . . . that the finding[s] cannot be allowed to stand," 442 F.2d at 770, particularly in view of the narrow construction of the Agricultural Marketing Agreement Act of 1937 mandated by *Zuber, supra*, 396 U.S. at 183–85, 90 S.Ct. 314[4]

[4] The case heavily relied on by the Secretary, *Sunny Hill Farms Dairy Co., Inc. v. Hardin*, 446 F.2d 1124 (8th Cir. 1971), did not address the sufficiency of evidence issue of *Fairmont* inasmuch as "Sunny Hill had not challenged the sufficiency of the evidence in support of the Secretary's findings that the differential was necessary to ensure an adequate supply of milk. . . ." *Sunny Hill, supra*, at 1127.

We have therefore determined that the three rulings of the Secretary at issue here are not in accordance with law and are invalid inasmuch as they all ultimately rely upon the unsupported findings of the October 1, 1970 order.[5]

III

It is unnecessary for us to consider the many procedural issues which consumed most of the attention of the Administrative Law Judge, the Judicial Officer and the court below, or to consider Borden's argument that the penalties imposed upon it by the three orders were similar to the subsidies declared illegal by the Supreme Court in *Lehigh Valley Cooperative Farmers, Inc., v. United States*, 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed.2d 345 (1962), as trade barriers prohibited by 7 U.S.C. § 608c(5)(G).

IV

[5] In regard to remedy, the three orders found invalid here have since been replaced by a new order and Borden has ceased doing business in Des Moines so there is no need for injunctive or declaratory relief. As to damages, Borden is entitled to recover overpayments which it made pursuant to the invalid orders. Inasmuch as the Quad Cities—Dubuque marketing order provides for payment by the market administrator to handlers out of the producer-settlement fund where claims are made pursuant to 7 U.S.C. § 608c(15)(A), 7 C.F.R. § 1063.89(d), we remand to the district court on the issue of damages, with direction to enter judgment for Borden in the amount ascertained after appropriate proceedings. *Fairmont, supra*, at 773.

[5]The Initial Decision of the Administrative Law Judge, adopted by the Judicial Officer, concluded that another "factor to be considered is the requisite producer approval of such an order or amendment" in accordance with 7 U.S.C. § 608c(9) and (19). Ex. 35 at 70. In the *Zuber* case the Supreme Court noted that "[i]t is the Secretary, not the farmers, who is responsible for administering the statute and initiating orders." 396 U.S. at 196, 90 S.Ct. at 329. In the context of the present case, although the amending order of October 29, 1970 was approved by two-thirds of the milk producers in the marketing area, such approval does not constitute evidence that the order or any of the three orders was justified.

The judgment of the district court is reversed and the cause remanded with directions to deny the defendant's motion for summary judgment, to grant the plaintiff's motion for summary judgment and to ascertain plaintiff's damages.

Reversed and remanded.

Exhibit C

***Borden, Inc.* v. *Bergland*, No. 74 C 2533, transcript of oral opinion of Hon. James B. Parsons, United States District Court for the Northern District of Illinois, Eastern Division, March 21, 1977**

Pursuant to the Seventh Circuit's mandate as found in Borden vs. Earl A. Butz, 544 F.2d 312, Seventh Circuit in 1976, I enter an order denying defendant's motion for summary judgment and granting plaintiff's motion for summary judgment.

The sole matter still pending is the ascertainment of damages which plaintiff is entitled to recover and which has been stated by the Court of Appeals to be "the overpayments which (Borden) made pursuant to the invalid orders," Borden vs. Butz, id. 319. This sum amounts to $249,978.38 and is calculated by taking the quantity of Class I milk purchased by plaintiff for its Des Moines plant during each month from October 1, 1970 through July 1, 1971 and

applying the price differences effected by the three orders found to be invalid.

The Secretary of Agriculture opposes on several grounds the entry of judgment in the amount referred to above.

The Secretary's first contention is that Borden is not entitled to overpayments on milk sold in the Des Moines area as it had agreed with its supplier to make these payments voluntarily. The Secretary goes on to assert, "This agreement is prima facie evidence that milk would not be available for less than this (higher) price."

Defendant's position that only a portion of the overpayments paid by Borden pursuant to the invalid orders should now be calculated as Borden's damages is patently erroneous.

The arrangement by Borden to pay an additional amount on milk resold in the Des Moines area was voluntary, and as such subject to modification at any time. It was, however, superseded and terminated by the subject orders once they became effective.

Whether or not the voluntary arrangement would have been maintained by the relevant parties is totally conjectural and cannot be considered in the ascertainment of damages, that is to say, the overpayments made by Borden by virtue of the three orders.

Moreover, the Seventh Circuit found the record to be barren of any economic justifications for those orders. It should be stressed that the Court of Appeals did not find explicitly or implicitly that the three illegal orders were somehow valid with respect to milk purchased for resale in any of the three areas served by the Des Moines plant.

The Secretary next urges that adjustments or credits which Mississippi Valley made to Borden should be subtracted from the total amount of overpayments and that further hearings are in order in this forum to ascertain whether credits were in fact granted, and, if so, the amount.

In support of this contention an affidavit of one U. Grant Greyson, Market Administrator for Order 63, has been submitted. That affidavit, however, reveals that the actual price paid by Borden for milk delivered to its Des Moines plant exceeded the federal order price.

Moreover, there is absolutely no basis in the record of this case indicating that Borden had not paid at least the minimum order price for the relevant period being challenged herein. It is the overpayments with respect to the minimum order price which constitutes Borden's damages.

Any credits or adjustments by Borden's suppliers for the over-order payments do not fall within the Secretary of Agriculture's jurisdiction and are irrelevant to these proceedings.

I should also observe that the issue of credits is now premature, as it is collateral to the assessment of Borden's damages. The Secretary may properly reassert this question at the time of seeking execution, if necessary, of the judgment.

Therefore, no portion of the overpayments made by Borden is to be deducted from the amount of damages because of any asserted credits.

The Secretary also contends that Borden must prove its damages, but this contention overlooks the nature of Borden's claim. Borden is not seeking damages for any economic injury flowing from and as a result of the invalid orders, but,

rather, is seeking the overpayments it has made and which has been defined by the Court of Appeals as the measure of Borden's damages.

The cases cited by the Secretary in support of its position are inapposite. I have the footnote Anniston Manufacturing Company vs. Davis, 301 U.S. 337; Rivera Manufacturing vs. U.S., 307 Fed. Supp. 916, District of Colorado in 1969 and Epstein vs. U.S., 357 F 2d 928, U.S. Court of Claims, 1966; Gumpert vs. United States, 296 F 2d 927, U.S. Court of Claims in 1961.

In each of the cases taxpayers sought to recover taxes alleged to have been illegally collected by the federal government. The respective courts found that the taxpayers had not made a requisite showing as to who actually bore the economic burden of paying the taxes.

Here, Borden was required to make the payments to its suppliers by virtue of what has now been determined as invalid orders. Nothing more remains to be shown.

Finally, there is a question of when interest is to be applied. Allowance of interest is controlled by federal law where the claim for relief is federally created. See Milwaukee Towne Corporation vs. Foss, Inc., 200 F 2d 17, 20, Seventh Circuit in 1952; Perkins vs. Standard Oil Company of California, 487 F 2d 672, 675, Ninth Circuit, 1973.

Whether or not to award prejudgment interest in cases arising under federal law has been placed within the sound discretion of the district court where, as here, the applicable federal statute provides no directive. See Blau vs. Lehman, 368 U.S. 403, 414, 1962; Lodges 743 and 1746, et cetera, vs. United Aircraft, 534 F 2d 422, 446, Second Circuit, 1975.

Moreover, the award of such interest is to provide just compensation and is not in the nature of a penalty. Rosa vs. Insurance Company of the State of Pennsylvania, 421 F 2d 390, 393, Ninth Circuit, 1970; Lodges 743 and 1746 vs. United Aircraft, which has been cited, that citation at page 447.

In the exercise of the sound discretion that is permitted me, it is my firm conviction that prejudgment interest is particularly applicable in this case and is the only meaningful manner by which plaintiff can be made whole. Borden has been deprived of the use of its money, a sum certain, for a period of time.

In addition, the Secretary denied Borden's application for interim relief by which the overpayments could have been placed in an escrow fund and retain the interest on these payments, and thereby could have preserved the value of the sum Borden had been compelled to pay.

In view of this, Borden is awarded damages in the amount of $249,978.38 plus interest at a rate of 6 per cent per annum from the dates on which its overpayments were made. The Court in this respect is guided in part by Illinois Revised Statutes, Chapter 74, Section 3, merely guided as to the rate of interest because of the absence of a federal interest rate.

No. 74 C 2533, Exhibit D

Borden, Inc.* v. *Earl Butz,
Secretary of the Department of Agriculture,
ruling motion of summary judgment on damages

In accordance with oral opinion delivered in open court this March 21, 1977, the court hereby enters an order deny-

ing defendant's motion for summary judgment and grants plaintiff's motion for summary judgment in the amount of $249,978.38 plus interest at a rate of 6% per annum from the dates on which its overpayments were made. Enter Rule 58 judgment order.

Exhibit E

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
ARGUED JANUARY 16, 1978
DECIDED APRIL 20, 1978

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN W. REYNOLDS, Chief District Judge*

BORDEN, INC.,
Plaintiff-Appellee,

No. 77-1805 *vs.*

BOB BERGLAND, SECRETARY OF AGRICULTURE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 2533
James B. Parsons,
Chief Judge

ORDER

In the prior appeal of this case we held that three amendments to milk marketing orders, promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c(5)(A), were not in accordance with law and were invalid because unsupported by

*Chief District Judge John W. Reynolds, of the Eastern District of Wisconsin, is sitting by designation.

the record. We, therefore, reversed a summary judgment entered by the district court upon review in favor of the Secretary. We also remanded the cause with directions to deny the defendant's motion for summary judgment, to grant the plaintiff's Borden, Inc. motion for summary judgment and to ascertain plaintiff's damages. In other words, we directed a summary judgment for the plaintiff as to liability but directed further proceedings "to ascertain plaintiff's damages."

No. 77-1805

Borden, Inc. v. *Butz*, 544 F.2d 312, 320 (7th Cir. 1976). We explained the damage aspects in further detail by saying that:

> As to damages, Borden is entitled to recover overpayments which it made pursuant to the invalid orders. Inasmuch as the Quad Cities—Dubuque marketing order provides for payment by the market administrator to handlers out of the producer-settlement fund where claims are made pursuant to 7 U.S.C. § 608c(15)(A), 7 C.F.R. § 1063.89(d), we remand to the district court on the issue of damages, with direction to enter judgment for Borden in the amount ascertained after appropriate proceedings.

Id. at 319–20.

The statute[1] and regulation[2] to which we specifically referred deal with the petition and hearing before the Secretary of Agriculture.

[1]7 U.S.C. § 608c(15)(A) provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the Pres-

(Footnote continued on next page)

No. 77-1805

Upon remand to the district court, the court properly entered an order dated March 21, 1977, denying defendant's motion for summary judgment. It was also proper at that time to grant plaintiff's motion for summary judgment as to liability only. The court, however, also fixed damages in the amount of $249,978.38 plus interest at a rate of 6 per cent per annum from the dates on which overpayments were made. We now determine on this appeal that the district court prematurely ascertained plaintiff's damages.

The record before us demonstrates that the parties had stipulated before the Administrative Law Judge the facts which were to constitute the exclusive basis for deciding the legal issues involved, but expressly deferred the submission of evidence establishing the monetary damages to which the plaintiff would be entitled, if successful, "until the legal issues have been resolved."

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ident. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

[2] 7 C.F.R. § 1063.89(d) provides:

> Any obligation on the part of the market administrator to pay a handler any money which such handler claims to be due him under the terms of this part shall terminate 2 years after the end of the calendar month during which the skim milk and butterfat involved in the claim were received if an underpayment is claimed, or 2 years after the end of the calendar month during which the payment (including deduction or setoff by the market administrator) was made by the handler if a refund on such payment is claimed, unless such handler, within the applicable period of time, files pursuant to section 8c(15)(A) of the Act, a petition claiming such money. 25 F.R. 12987, Dec. 20, 1960, as amended at 34 F.R. 18665, Nov. 22, 1969.

We agree with the conclusion of the court which recently decided the procedure which should follow the finding of the illegality of a milk marketing order in *Abbotts Dairies Division of Fairmont Foods Co.* v. *Bergland*, 438 F. Supp. 629, 636 (E.D. Pa. 1977):

> The determination of . . . [damages] obviously will require evaluation of complex economic relationships between producers and handlers during the time period for which damages are sought. Such matters are peculiarly within the special expertise of the Secretary.

We reverse the judgment of the district court insofar as it fixes the amount of damages and remand the cause to the district court with instructions to remand it to the Secretary of Agriculture to conduct an evidentiary hearing and to render an administrative decision on the amount of the plaintiff's damages, which amount shall not be less than $84,463 nor more than $249,978.33, and in regard to which the Secretary shall determine whether interest shall be added. The Secretary's decision will, of course, be subject to statutory review by the district court.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 20, 1978

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN W. REYNOLDS, Chief District Judge*

BORDEN, INC.,
Plaintiff-Appellee,
No. 77-1805 *vs.*
BOB BERGLAND, Secretary of the Department of Agriculture,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-2533
James B. Parsons, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED with instructions, in accordance with the order of this court entered this date.

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*Chief District Judge John W. Reynolds, of the Eastern District of Wisconsin, is sitting by designation.

Exhibit F

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 30, 1978

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOHN W. REYNOLDS, Chief District Judge*
Hon.

BORDEN, INC.,
Plaintiff-Appellee.
No. 77-1805 *vs.*
BOB BERGLAND, SECRETARY OF AGRICULTURE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 2533
James B. Parsons,
Chief Judge

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellee, Borden, Inc., a majority of the judges on the original panel having voted to deny the same, **

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

**Chief District Judge John W. Reynolds, of the Eastern District of Wisconsin, is sitting by designation.

**Circuit Judge Robert A. Sprecher has disqualified himself from participation in the petition for rehearing.

Exhibit G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-2245
77-2246
77-2247

ABBOTTS DAIRIES DIVISION OF FAIRMONT FOODS, INC.

vs

EARL M. BUTZ, *Secretary of Agriculture*
U. S. DEPARTMENT OF AGRICULTURE
PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION INC.
LEHIGH VALLEY COOPERATIVE FARMERS and
CAPITAL MILK PRODUCERS COOPERATIVE, INC.
Intervening defts.

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,
Intervenors.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D. C. Civil No. 71-549)

Argued
May 22, 1978
Before: ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges.

OPINION OF THE COURT
(filed Aug 1, 1978)

HIGGINBOTHAM, *Circuit Judge*

Under the Agricultural Adjustment Act of May 12, 1933, 48 Stat. 31, as amended, 7 U.S.C. §601 *et seq.*, the minimum

price at which milk processors and distributors ("handlers") may purchase unprocessed milk from farmers ("producers") is subject to regulation by the Secretary of Agriculture. As a result, milk prices are typically adjusted in accordance with changing economic indices in order to assure, *inter alia*, "an orderly flow of the supply . . . [of milk] to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. §602(4). This case raises the question whether Abbotts Dairies Division of Fairmont Foods Company ("Abbotts"), after succeeding ultimately in invalidating a Milk Marketing Order of August 20, 1969, may now recover the difference between the invalid order price and a lesser proposed price for the period between September, 1969 and July, 1970.[1] Also before us are the issues whether the amount of Abbotts' overpayment could be made subject to reduction to the extent that Abbotts "passed on" any excess prices to its customers, and whether the Secretary must in the first instance consider the restitution question.

The district court, rejecting the passing on defense determined that Abbotts could receive recompense in the amount of the difference between the invalid order price and the price at which Abbotts would have been able to purchase milk during the period in question. The district court determined also that the case should be remanded to the Secretary for ascertainment of that amount and the amount of interest, if any, which should be awarded.[2] For the reasons ex-

[1]Abbotts states in its brief that the relevant period for calculating recovery extends from September, 1969 to September, 1970. Brief for Abbotts at 12 n. 6. However, the amount Abbotts has at oral argument indicated it seeks is calculated based on the September, 1969, to July, 1970 period. We will limit our consideration to the latter period because it is the only one for which damages were sought below and because of the assertions made on oral argument and elsewhere in Abbotts' brief. *See* Brief for Abbotts at 3-4.

[2]We intimate no view on the merits of the interest question.

pressed below we reverse the district court's order of remand to the Secretary and instruct the district court to make findings in the specified areas, as necessary, and enter judgment accordingly.

The procedural history of this case cannot, unfortunately, be stated so briefly as would be desired. Over a period of nine years the issues in this case have been litigated, adjudicated, revised and reconsidered in several different administrative and judicial proceedings. There have been three rulings by the Secretary since the August 20, 1969, Order, pursuant to three administrative proceedings; there has been extensive litigation in the United States District Court, first the Secretary's action for a preliminary injunction before Judge Luongo and then the hearings before and adjudications by Judge Ditter on the validity of the August 20, 1969, Order and the availability of damages; and, now, there have been two appeals to this Court.

Decades ago scholars pressed for reform of the judicial process; they were confident that the new administrative law process would be above all far more expeditious, fair, and responsive than what had sometimes proven to be a slow, protracted judicial process. This case exemplifies one instance in which those lofty expectations of expedition have not been met, and it is difficult to imagine a case intertwined with greater confusion and delay on a problem which, but for the administrative process, was not extremely complex. Despite this Abbotts is confronted with a request for yet another remand which could extend this litigation into its second decade.

The triggering event for this case took place on August 20, 1969, when the Secretary issued a Milk Marketing Order for

the Delaware Valley Marketing Area[3] instituting what is known as a "penny-by-penny" system for adjusting the minimum price which a milk handler (*e.g.*, Abbotts) must pay to milk producers. According to this system the minimum price of milk would rise on a penny-by-penny basis in conformity with rises in the price of milk in the Minnesota-Wisconsin area. This penny-by-penny pricing constituted a departure from the Delaware Valley Marketing Area tradition of bracket pricing, by which the price of milk moved in steps of twenty (20) cents when by the relevant economic formula a different bracket became applicable. The practical effect of the penny-by-penny system was that the price of milk became indisputably higher during the period at issue. At a hearing before the Secretary on October 30, 1969, to reopen the matter of the August 20, 1969, Order, Abbotts as well as all producers who were represented opposed the penny-by-penny system in favor of bracket pricing.[4] Significantly, Abbotts' proposal at that hearing was a bracket price different from, and in excess of, the price under the previously valid Marketing Order.[5]

After a hearing and upon finding that Abbotts had refused to pay the August 20, 1969, Order price, Judge Luongo on August 20, 1970, enjoined Abbotts to cease and desist viola-

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[3]On August 1, 1970, the Delaware Valley Marketing Area was merged with two other marketing areas to form the Middle Atlantic Marketing Area. 35 Fed. Reg. 7924, 10,273 (1970).

[4]A hearing held on June 16 and 17, 1969, was found by Judge Ditter not to have provided any evidence to sustain the Order. The issue of the invalidation of the Order is, of course, not before us.

[5]The minimum price in effect just prior to the August 20, 1969, Order was $7.17 per hundredweight. The operative Order price was put into effect provided for bracketed pricing, although some temporary emergency prices were established. Abbotts Dairies Div. of Fairmont Foods v. Butz, 389 F.Supp. 1, 4–6 (E.D.Pa. 1975).

tions of the Marketing Order, to pay in the future the higher minimum price provided in the Secretary's Marketing Order and otherwise adhere to that Order, and to pay $34,126.25 as its due share of the administrative expenses of maintaining a producer-settlement fund.[6] In enjoining Abbotts, Judge Luongo rejected its request, contained in its April 22, 1970, Answer, that if the Government's prayer for an injunction was granted those funds representing the difference between the proposed bracket price Abbotts was willing to pay and the penny-by-penny price the Secretary demanded should be deposited with the court.[7] In rejecting this request Judge Luongo relied upon the view that the reserve in the producer-settlement fund would stand as a ready source for recovery of overpayments in the event the August 20, 1969, Marketing Order was subsequently invalidated.

On November 27, 1972, Judge Ditter filed an opinion overturning the decision of the Secretary which upheld the penny-by-penny August 20, 1969, Order as being based upon no evidence whatever. 351 F. Supp. 561 (E.D. Pa. 1972). The matter was remanded to the Secretary at his request, and

[6]The producer-settlement fund provides a pool by which prices paid to producers by handlers may be adjusted to reflect the value of the use to which the purchased milk was ultimately put. In the context of the complicated administrative scheme, the fund enables producers to receive a uniform minimum price at the time of purchase. *See* 7 C.F.R. §1004.1 *et seq.*; Zuber v. Allen, 402 F.2d 660,661–62 (D.C. Cir. 1968), *aff'd*, 396 U.S. 168 (1969). The $34,126.25 in administrative expenses is not at issue on this appeal.

[7]United States v. Abbotts Dairies Div. of Fairmont Foods, Co., 315 F. Supp. 571 (E.D.Pa. 1970).

Judge Luongo determined that under United States v. Ruzicka, 329 U.S. 287 (1946), the issue of an Order's validity *vel non* could not be raised as a defense to an injunction for compliance. Thus the attempt to place monies on deposit with the court was meant to preserve a fund which might later be the source of refunds should the Order subsequently be invalidated.

later came before Judge Ditter again. In his opinion of January 9, 1975, he again held the August 20, 1969, Order to be invalid, concluding: "[T]here is no substantial evidence to support the decision and it is therefore arbitrary and capricious and must be set aside." 389 F. Supp. 1, 12 (E.D. Pa. 1975). In 1976 Judge Ditter yet again spoke to the issue, rejecting the Secretary's motion for reconsideration. 421 F. Supp. 415 (E.D. Pa. 1976), *aff'd*, 559 F.2d 1207 (3d Cir. 1977) (judgment order).[8] As detailed at the outset, the present appeal follows Judge Ditter's decision on monetary recovery only.

Throughout the procedural history of this case Abbotts and the Government have been the only litigating adversarial parties. A milk farmers' cooperative, Pennmarva Dairymen's Cooperative Federation, Inc. ("Pennmarva"), having been granted limited intervention for the determination of the refund issue, is before us on this appeal asserting, *inter alia*, that no *in personam* judgment can be filed against current producers for receipt by producers in 1969 and 1970 of overpayments which were required by a then operative minimum pricing Order.

I.

We will first consider the availability of the passing on defense in the present case.

* * *

II.

We turn now to the issue of the measurement of monetary recovery and the related issue of the district court's remand

[8]Part of Judge Ditter's decision denied a motion by some producer cooperatives to intervene for all purposes including review of the Order. The court limited intervention to the issue of monetary recovery. This is the aspect of the case which was affirmed by a panel of this court.

to the Secretary.[9] In *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971), the court faced a similar question arising not out of an invalid minimum price order but from an invalid location price differential in a milk marketing order. The location differential required some handlers to pay a price greater than the minimum order price for milk received from producers in designated areas. The court invalidated the differential on the ground that the evidence was insufficient to show "an economic service [by producers] of benefit to the handler." *Id.* at 767; *see Zuber v. Allen*, 396 U. S. 168 (1969). The court then awarded a refund in the amount of the invalid differential, without a remand to the Secretary:

> The Secretary argues that had the invalidity of this Order been apparent at the time, he would have chosen to replace the differentials with a single Order price, one which would have been higher than the 1965 Eastern Zone price. Thus, according to the Secretary, not all, if any, of Fairmont's payments above the Eastern price can be considered overpayments subject to refund. This argument, based as it is on mere conjecture and supposition, ignores the fact that such alternative measures were not utilized, that the Secretary in fact assumed that his Order was valid and imposed the price differentials on the basis of that assumption. We are not

[9]It is not clear from the present record or from the parties' briefs or arguments whether the invalid Order price for the period in issue (a period preceding the August 20, 1970, injunction) was required pursuant to a construction of the injunction's commands or by some other method. Abbotts maintains, and the district court found, that Abbotts was able to obtain an adequate supply of milk at its proposed bracket price up to the August 20, 1970, injunction. Tr. Oral Argument, May 22, 1978, at 3 (statement by counsel for Abbotts). Nevertheless, all parties are in agreement that as a result of the Secretary's invalid August 20, 1969, Order, Abbotts has been required to pay some substantial amount for milk in excess both of the last valid marketing order price ($7.17 cwt.) and the intermediary bracket price which Abbotts proposed. This matter can be definitely determined on remand.

> persuaded by the argument that had Fairmont not been required to pay a differential, it might have been required to pay the same price anyway as a result of some alternative regulatory scheme.

Id. at 773; *see Borden, Inc.* v. *Butz*, 544 F.2d 312, 319–20 (7th Cir. 1976). Were we to rely on the *Fairmont* analysis it would appear that the amount of recovery in this case should be the difference between the last valid order price and the price paid by Abbotts. In *Fairmont*, the possibility that some intermediary price might have been put into effect, had the Secretary known immediately of the invalidity of the scheme, was viewed as legally irrelevant. We need not, however, decide here whether the last valid price should serve as a basis for measuring a refund since Abbotts asks that its recovery be based on the higher price which it proposed to the Secretary in 1969.

The Government and Pennmarva contend, in opposition to the apparent simplicity of the *Fairmont* formula, that a refund should be based on principles of equitable restitution and hence should require consideration of whether the invalid price was nevertheless a reasonable price.[10] For this proposition they rely in part upon the more recent decision of the District of Columbia Court of Appeals in *Moss* v. *Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 966 (1977). The court in *Moss*, applying equitable restitution principles, declined to grant a refund to claimants

[10]In Atlantic Coast Line R. Co. v. Florida, 295 U.S. 301 (1935), although the Court denied restitution to the party who paid, pursuant to an order later held invalid, freight rates in excess of the last valid rates, the Court's analysis rested on the view that restitutionary power was "ancillary" to the power of the district court to determine the validity of the Commission's order. *Id.* at 314. It is our view that an analogous equitable restitutionary power exists in this case, subject of course to the equitable principles enunciated in *Atlantic Coast. See also* Moss v. Civil Aeronautics Board, 521 F.2d 298, 306-07 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 966 (1977).

who paid airline passenger rates which were ultimately held invalid. Petitioner in *Moss* unsuccessfully argued that the difference between the invalidated rate and the last lawful rate should constitute the measure of overpayment recovery. The court recited as findings of fact that the invalidated rate was reasonable, that therefore there was no resulting excess profit or enrichment, and that there existed no "fund of net enrichment from which restitution could appropriately be made." *Id.* at 314. Nevertheless, the court rested its conclusion on the view that

> [t]he fares in question were charged by the carriers in reasonable reliance on the Board's explicit approval of them. To the extent that the Board was mistaken about the lawfulness of the filing, the consequences of that mistake should not be visted upon the carriers, certainly absent any actual unjust enrichment.

Id. at 314–15. To follow literally the quoted *Moss* prescription in the instant matter might be to deny recovery to Abbotts on the theory that the producers who received the overpayments were not at fault. However, because the facts in *Moss* indicate the reasonableness of the invalid fare and the unreasonableness of the last valid fare and because the court concluded that the airlines were not enriched and that there was no fund from which restitution could be made, the holding may be narrowly circumscribed.

Atlantic Coast Line R. Co. v. *Florida*, 295 U.S. 301 (1935), guides us on a path between *Fairmont* and *Moss*. The Court there refused restitution of prices paid pursuant to an Interstate Commerce Commission order. In the time between the issuance of the order replacing what was viewed by the Commission as a discriminatory rate schedule, and the Court's invalidation of it, the claimant carrier had complied. Fourteen months after the declaration of invalidity, the Interstate Commerce Commission repromulgated the same order without defect based upon new evidence and new findings.[11] The Court accepted as fact that the rate in effect prior to the invalidated order was "less than compensatory and would result in confiscation . . .," *id.* at 313, and further observed that the claimants failed to show the unreasonableness of the rate established by the invalid order. *See id.* at 318. The Court rejected arguments for applying an intermediary rate in the absence of a showing that the invalid one was unreasonable. We view *Atlantic Coast* to instruct that the unreasonableness of an invalid administrative agency rate and the reasonableness of the rate sought to be used as a measure must appear before restitution of an overpayment can be decided.

In the present case, unlike *Atlantic Coast*, Abbotts' proposed bracket price formula was also proposed at the October, 1969, Department of Agriculture hearing by the Interstate Milk Producers representing seventy-five percent of the milk producers in the Delaware Valley area. This fact, as determined by the district court and not urged to be clearly erroneous, is itself persuasive of the reasonableness of the proposed price. The area tradition of pricing at the required minimum and availability of milk to Abbotts at the proposed bracket prices up to the August 20, 1970, injunction,[12] although viewed insufficient by the district court, reaffirm that conclusion. Furthermore, the Secretary's penny-by-penny price was itself unanimously opposed by the wit-

[11] The Court specifically observed: "During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark." *Id.* at 311–12.

[12] The stated fact that Abbotts continued to obtain milk at the proposed bracket price until the injunction seems to undermine the district court's decision to remand for a determination of the price which Abbotts would have had to pay for milk for the relevant period, since the relevant period preceded the injunction.

nesses at the October 1969 hearing. It was this total absence of evidentiary support which led the district court to conclude that it was arbitrary and capricious. Indeed, we note in passing that, unlike *Atlantic Coast*, the record reveals that in six years since the invalidation of the 1969 Order there has been no repromulgation based on evidence favoring penny-by-penny pricing. Although Pennmarva states that a hearing was held by the Secretary in October, 1977, that proceeding could not reasonably be expected to affect the issue of the fairness of the penny-by-penny Order in 1969 and 1970, given the facts as already described.

In view of these circumstances, the producers who received overpayments did, we believe, receive enrichment in the form of excessive and unlawful prices, though they were certainly not at fault for the actual issuance of the Secretary's order. Equitable restitution to Abbotts to the extent of the monies in the producer-settlement fund reserve is therefore appropriate in our view. Denial of restitution on the facts presented here would virtually remove any possibility of recovery of overpayments due to invalid milk pricing orders. We do not believe that *Atlantic Coast* contemplated such a broad scale denial.

There additionally appears to be no reason for a remand to the Secretary.[13] Attempting to ascertain in this case the price at which Abbotts would have been able to purchase milk seems meaningless in light of the district court's state-

[13]The provision conferring jurisdiction to the Secretary, 7 U.S.C. §608(c) 15(A), does not provide any specific indication that the Secretary may go beyond the determination initially of the validity or scope of a marketing order. In any event the issues left to be decided in this case are not of the kind which are peculiarly within the expertise of the Secretary and which might otherwise justify resort to the administrative process. *See* Nader v. Allegheny Airlines, 426 U.S. 290, 305–06 (1976).

ment that Abbotts continued to purchase milk at the proposed bracket price prior to the August 20, 1970, injunction. Even without this fact an inquiry into what the price of milk would have been would not likely contribute anything to the evidence since the effect of the invalid Order itself during the period in question would naturally be considerable, reducing the probative quality of any attempt at reconstructing economic history. This or related litigation has already extended over an eight year period and has received considerable judicial and administrative attention, as described earlier. At this stage we cannot view lightly the possibility of further complication and delay.

III.

The precise amounts determined by Herbert L. Forest[14] (as the difference between the total price required to be paid by

[14]Mr. Forest calculated the difference between payment of penny-by-penny prices and bracket prices by Abbotts for the relevant period. Mr. Forest assumed that all Abbotts' purchases of milk were ultimately at the penny-by-penny rate. No party has contested the accuracy of his calculations given the underlying assumption.

ABBOTTS' CLASS I VALUE CHANGES WITH BRACKETED PRICE

Months	Class I Lbs. of Milk	Change in Price	Change in Value
Sept '69	22,723,613	−9¢	$ −20,451.25
Oct	24,594,803	+4¢	+ 9,837.92
Nov	21,907,402	−5¢	−10,953.70
Dec	22,800,526	−9¢	−20,520.47
Jan '70	22,194,193	−10¢	−22,194.19
Feb	20,220,229	−14¢	−28,308.32
Mar	21,701,959	−10¢	−21,701.96
Apr	22,458,730	−5¢	−11,229.37
May	21,252,311	−7¢	−14,876.62
Jun	19,923,017	−5¢	− 9,961.51
Jul	20,221,225	−8¢	−16,176.98
			$−166,536.45

See Affidavit of Herbert L. Forest, Director, Dairy Division, Agricultural Marketing Service, Department of Agriculture, April 29, 1975, at 5; Abbotts Dairies Division of Fairmont Foods Company v. Bob Bergland, C.A. No. 71-549, Slip Op. at 4 (E.D. Pa., filed June 16, 1977).

Abbotts for milk from September, 1969, through July, 1970, and the proposed bracket price) should serve as the basis for an award of restitution to Abbotts unless: (1) the district court, in addressing the matter of the amount of Abbotts' overpayment, finds that not all of the milk purchased by Abbotts during the relevant period was paid for at the invalid penny-by-penny price due to obligations stemming from the invalid Order; or (2) the possibility of cost-plus contracts between Abbotts and others is properly raised and the cost-plus exception to *Hanover* is deemed applicable.[15] The reserve in the producer-settlement fund will serve as the source for the refund of this overpayment.[16]

The district court's Order remanding this case to the Secretary will be vacated and the matter will be remanded to the district court for disposition in accordance with the above opinion.

A. LEON HIGGINBOTHAM
Circuit Judge

[15]The district judge must also consider the issue whether interest is recoverable and, if so, its amount.

[16]At present both the Government and Pennmarva have acknowledged the acceptability of employing the reserve in the producer-settlement fund as the sole source of refund to Abbotts. Tr. of Oral Argument, May 22, 1978, at 24–25 (statement of counsel for Pennmarva); Government's Brief at 7. This is so even though the overpayments consist of money paid to producers directly in 1969 and 1970, and even though some producers presently in the market were not direct beneficiaries of the excessive invalid order price for the period in issue. We believe that this fluid fund, designed essentially as a pool by which milk prices may be made uniform, is a permissible source for the refunding of the overpayments at issue here. *See Borden, supra; Fairmont, supra.* We emphasize that the above decision is not based on any view that producers are liable *in personam* and is intended to be applicable solely to the factual situation in which a reserve fund exists. We do not pass upon the situation in which no fund exists or in which restitution is sought from the producers themselves. Nor do we decide upon the availability of the passing on defense where producers are sought to be held personally liable for overpayments.

Exhibit H

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

BORDEN, INC., *Plaintiff-Appellee,* vs. **BOB BERGLAND, SECRETARY OF AGRICULTURE,** *Defendant-Appellant.*	No. 77-1805

Appeal from the United States
District Court for the
Northern District of
Illinois, Eastern Division.
No. 74 C 2533
James B. Parsons, *Chief Judge*

MOTION FOR LEAVE TO FILE INSTANTER RENEWED PETITION FOR REHEARING AND FOR REHEARING EN BANC

Plaintiff-appellee Borden, Inc., by its attorneys hereby moves for leave to file instanter a renewed petition for rehearing and for rehearing *en banc* in order to bring to this Court's attention the reversal of *Abbotts Dairies Division of Fairmont Foods Co.* v. *Bergland*, 438 F.Supp. 629 (E.D. Pa. 1977) by the United States Court of Appeals for the Third Circuit on August 1, 1978.

DATED: August 25, 1978

By: STUART S. BALL
One of the attorneys for
Borden, Inc.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 77-1805

BORDEN, INC., *Plaintiff-Appellee,*

vs.

BOB BERGLAND, Secretary of Agriculture, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 74 C 2533

Honorable James B. Parsons Presiding

Appellee's Renewed Petition for Rehearing and for Rehearing En Banc

Plaintiff-appellee, Borden, Inc., hereby renews its petition for rehearing and further petitions for a rehearing *en banc* on the grounds that the sole decision relied upon by this Court in its Order of Reversal of April 20, 1978, *Abbotts Dairies Division of Fairmont Foods Co.* v. *Bergland*, 438 F. Supp. 629 (E.D. Pa. 1977), has, subsequent to the denial of Borden's initial petition for rehearing, been reversed by the Court of Appeals for the Third Circuit. A copy of the opinion of the Third Circuit, filed August 1, 1978, is attached.* The grounds for rehearing advanced herein are in addition to those stated in Borden's initial petition for rehearing, filed May 4, 1978.

*A copy of the opinion of the Court in *Abbotts Dairies* was not received by counsel for Borden until August 16, 1978.

I. In Its Order of Reversal, This Court, Ignoring the Doctrine of "Law of the Case", Reversed Its Own Mandate on the Prior Appeal on Two Major Points, Relying Exclusively on a District Court Decision in Abbotts Dairies, Which Has Now Been Reversed.

Contrary to the law of the case doctrine, this Court's Order of Reversal of April 20, 1978 altered the mandate previously issued by this Court in *Borden, Inc.* v. *Butz*, 544 F.2d 312 (7th Cir. 1976) in two important respects. First, the Order of Reversal remanded the case to the Secretary of Agriculture to calculate Borden's damages, while the prior mandate had specifically remanded to the district court for that purpose. Secondly, the Order of Reversal stated that the determination of damages would "require evaluation of complex economic relationships", while the prior mandate had defined Borden's damages correctly and very simply as "overpayments which it made pursuant to the invalid orders." 544 F.2d at 319–20.

In reversing this Court's own mandate on the initial appeal, the Order of Reversal stated only:

> "We agree with the conclusion of the court which recently decided the procedure which should follow the finding of the illegality of a milk marketing order in [*Abbotts Dairies*]."

The district court decision relied on was reversed by the United States Court of Appeals for the Third Circuit on August 1, 1978. This means that the Order of Reversal is now not only in conflict with the decision of this Court on the first appeal and with the decision of the Court of Appeals for the District of Columbia in *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971) but also with the decision of the Court of Appeals for the Third Circuit. Since the Order of Reversal gave no reason for its mandate other than the now reversed district court opinion in *Abbotts Dairies*, this Court should now reconsider the Order.

II. The Third Circuit's Reversal of the Abbotts Dairies Decision Undercuts This Court's Order of Reversal, and Its Opinion Sets Forth Principles That Should Also Be Followed Here.

In its opinion, the Third Circuit made three points which are directly applicable to this case and which should control the disposition of Borden's damage claims:

1. The Third Circuit firmly and unambiguously rejected the notion that the calculation of damages would require evaluation of complex economic relationships, pointing out the futility of "any attempt at reconstructing economic history." The Court found that the record before it permitted the calculation of the overpayments made by the dairy and held that this was the proper measure of damages. Overpayments are even more readily ascertainable in Borden's case, and therefore should be the measure of damages, as this Court held on the first appeal. The Third Circuit in reversing the District Court found this to be a far simpler and more direct means of ascertaining damages than that urged by the Secretary, both in that case and here, explaining,

> "This or related litigation has already extended over an eight-year period and has received considerable judicial and administrative attention, as described earlier. At this stage we cannot view lightly the possibility of further complication and delay." (Slip Opinion, at 15).

2. The Third Circuit ruled that there was "no reason for a remand to the Secretary" and that the damages should be ascertained by the district court in accordance with its opinion. (Slip Opinion, at 14–16).

3. The Third Circuit reaffirmed the correctness of *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971) and cited as well the mandate of this court on the initial appeal in this case both as to the measure of damages and as to the procedure to be followed in ascer-

taining damages. (Slip Opinion, at 10–11). *Fairmont*, like the present case, involved only the invalidation of specific adjustments to an otherwise valid Order price. Since ascertainment of damages is less complicated in these circumstances than where, as in *Abbotts Dairies*, the entire pricing mechanism has been invalidated, the reasoning of the Third Circuit would *a fortiori* dictate against remand to the Secretary for prolonged evidentiary proceedings here.

CONCLUSION

For the foregoing reasons, the Order of Reversal should be vacated and the judgment of the district court after the initial remand affirmed. In the alternative, this case should be set for reargument in light of the intervening *Abbotts Dairies* decision.

Respectfully submitted,

STUART S. BALL

One of the attorneys for
Borden, Inc.

[Relevant portions of the Slip Opinion of the Court of Appeals in *Abbotts*, which opinion was appended to the above Petition for Rehearing and for Rehearing En Banc, are contained in the Appendix, *supra*, as Ex. G.]

Exhibit I

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 8, 1978.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. _____
Hon. _____

BORDEN, INC., *Plaintiff-Appellee,* **No. 77-1805** *vs.* **BOB BERGLAND, Secretary of the Department of Agriculture,** *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 74-C-2533 **James B. Parsons,** Judge

This matter comes before the court for its consideration upon the filing herein of the following documents:

(1) The "MOTION FOR LEAVE TO FILE INSTANTER RENEWED PETITION FOR REHEARING AND FOR REHEARING EN BANC" filed herein on August 28, 1978 by counsel for the plantiff-appellee.

(2) The "APPELLEE'S RENEWED PETITION FOR REHEARING AND FOR REHEARING EN BANC" received herein on August 28, 1978 by counsel for the plaintiff-appellee.

(3) The "REQUEST FOR FURTHER EXTENSION OF STAY OF MANDATE" filed herein on August 29, 1978 by counsel for the plaintiff-appellee.

(4) The "APPELLANT'S OPPOSITION TO APPELLEE'S MOTION FOR LEAVE TO FILE INSTANTER RENEWED PETITION FOR REHEARING AND FOR REHEARING *EN BANC*" filed herein on September 5, 1978 by counsel for the defendant-appellant.

On consideration thereof, this court being fully advised concerning the circumstances of this matter,

IT IS ORDERED that the motion of the plaintiff-appellee for leave to file instanter its renewed petition for rehearing and suggestion for rehearing en banc is hereby DENIED.

IT IS FURTHER ORDERED, however, that the mandate of this court be STAYED until September 15, 1978.

Exhibit J

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August 10, 1973

Edward Silverstein, Esquire
United States Department of
Agriculture
Office of the General Counsel
Washington, D.C. 20250

Re: *In re Borden, Inc., AMA Docket M 63-2*

Dear Mr. Silverstein:

With respect to the revised Stipulation accompanying Mr. Chernauskos' letter to me dated July 24, 1973, we were concerned initially with the fact that the paragraphs contained in our proposed stipulation relating to Borden's Class I sales qualifying under the Quad Cities-Dubuque Order during the relevant time periods were eliminated.

However, after discussing this matter with you, we understand that these paragraphs were eliminated with the thought that this proceeding be decided initially on the basis

of the legal issues only and that the question of the refund to which Borden, if successful, is entitled be resolved at a later date, informally or otherwise. This is entirely agreeable to us and we are, accordingly, enclosing the signed Stipulation.

We also discussed the matter of a briefing schedule and agreed that, subject to concurrence of the Administrative Law Judge, Borden's brief would be filed October 1, the Department's brief on November 1, and Borden's reply on November 15, 1973.

I presume that you will advise us as to the precise briefing schedule established by the Judge.

Very truly yours,

/s/ Lee A. Monroe

Lee A. Monroe

LAM:laf
Enclosure

Exhibit K

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September 10, 1973

Office of Hearing Examiners
U.S. Department of Agriculture
Washington, D.C. 20250

In re: *Borden, Inc., AMA Docket M63-2*

Dear Sir:

Enclosed for appropriate distribution in connection with the above docket are four (4) copies of the Stipulation and all of the documents which are incorporated therein. In accordance with the Stipulation, the factual recitations and attached exhibits are to constitute the exclusive basis for deciding the legal issues in this proceeding.

In accordance with our agreement with Mr. Silverstein, the submission of evidence establishing the monetary refund to which Petitioner, if successful, may be entitled has been deferred until the legal issues have been resolved.

Very truly yours,
/s/ Lee A. Monroe

Lee A. Monroe:bab
cc: John H. Sandor, w/o encls.
Edward Silverstein, w/o encls.

Exhibit L

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Borden, Inc.,
Petitioner

AMA Docket No. M63-3

Respondent's Response to the Judicial Officer's June 30, 1978 Decision and Order

The Judicial Officer's June 30, 1978 Decision and Order and his July 18, 1978 denial of respondent's "Motion to Modify Remand Order" required respondent to engage in further rulemaking. As directed, further rulemaking, by way of analysis of the 1973 record, was conducted. Such analysis led to the conclusion that additional findings, based on adequate record evidence, could not be made to sustain the Assistant Secretary's January 24, 1974 decision.

In view of the above, respondent respectfully submits that petitioner is entitled to a hearing to prove financial injury it suffered as a result of the challenged decision. §8c(15) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)). Respondent respectfully requests that this matter be remanded to the Adminstrative Law Judge for such a hearing. See the April 20, 1978 decision of the United States Court of Appeals for the Seventh Circuit (*Borden, Inc.* v. *Bergland*, No. 77-1805), attached to respondent's "Motion To Modify Remand Order" filed July 14, 1978, in

which the Court ruled that damage issues in this type of proceeding must be initially ruled upon by the Secretary who has primary jurisdiction under the Act.

Respectfully submitted,

EDWARD M. SILVERSTEIN

EDWARD M. SILVERSTEIN
Attorney for Respondent

Motion Granted

/s/DONALD A. CAMPBELL

Donald A. Campbell
Judicial Officer
Office of the Secretary

Supreme Court, U. S.
FILED
JAN 5 1979
MICHAEL RODAK, JR., CLERK

No. 78-516

In the Supreme Court of the United States

OCTOBER TERM, 1978

BORDEN, INC., PETITIONER

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Abbotts Dairies v. *Butz*, 584 F.2d 12....10, 11, 12	
Adams v. *Mills*, 286 U.S. 397	10
Atlantic Coast Line Railroad v. *Florida*, 295 U.S. 301	9
Fairmont Foods Co. v. *Hardin*, 442 F.2d 762	11
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481	10
Louisville & Nashville R.R. v. *Sloss-Sheffield Co.*, 269 U.S. 217	10
Moss v. *CAB*, 521 F.2d 298, cert. denied, 424 U.S. 966	9
Williams v. *Washington Metropolitan Area Transit Comm'n*, 415 F.2d 922, cert. denied, 393 U.S. 1081	9
Wisniewski v. *United States*, 353 U.S. 901	8

Statutes:

Agricultural Adjustment Act of 1933, 7 U.S.C. 601 *et seq.*	2
7 U.S.C. 608c(15)(B)	4

In the Supreme Court of the United States

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BORDEN, INC., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. a-3 to a-19) is reported at 544 F.2d 312. The opinion of the district court on remand (Pet. App. a-19 to a-23) is unreported. The opinion of the court of appeals on appeal from the decision on remand (Pet. App. a-24 to a-27) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. a-28) was entered on April 20, 1978. A petition for rehearing was denied on June 30, 1978 (Pet. App. a-29). The petition for a writ of certiorari was filed on September 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals failed to apply the law of the case.
2. Whether the court of appeals properly remanded the case to the Secretary of Agriculture for further proceedings on the issue of damages.

STATEMENT

1. Prior to September 1970, petitioner operated a milk processing plant in Des Moines, Iowa, and a second plant in Rock Island, Illinois. The first plant was subject to the Department of Agriculture's "Des Moines Milk Marketing Order," while the second plant was subject to the Department's "Quad Cities—Dubuque Milk Marketing Order."[1] Under the terms of the two orders, each processing plant was governed by the order applicable to the area in which it distributed most of its milk (Pet. App. a-4).

[1] The Agricultural Adjustment Act of 1933, 7 U.S.C. 601 *et seq.*, provides for the Secretary of Agriculture to issue milk marketing orders for various regions of the country. The marketing orders establish the minimum prices at which milk handlers, such as petitioner, may buy milk from milk producers (dairymen). The milk marketing orders are intended to stabilize the milk production market throughout the country.

On September 1, 1970, petitioner closed its Rock Island plant and began serving customers in the Quad Cities—Dubuque area from its Des Moines plant. As a result of this change, the Des Moines plant began distributing most of its milk in the Quad Cities—Dubuque area and thus became subject to the milk marketing order for that area. At that time the minimum price set for Class I milk was 15 cents per hundredweight lower under the Quad Cities—Dubuque order than under the Des Moines order. In addition, the Quad Cities—Dubuque order provided that the minimum price for Class I milk would be reduced for handlers, such as petitioner, who were located at a distance of more than 70 miles from the center of the marketing area. Under the formula set out in the Quad Cities—Dubuque order, the minimum price at which petitioner was permitted to buy milk was reduced by 19 cents per hundredweight because of the distance of petitioner's Des Moines plant from the Quad Cities—Dubuque marketing area (Pet. App. a-4 to a-5).

Accordingly, because of the 15 cent price disparity between the two areas and the 19 cent distance discount that petitioner enjoyed under the Quad Cities—Dubuque order, petitioner was able to purchase milk at a minimum price 34 cents per hundredweight lower than the price applicable to other milk handlers

located in Des Moines but subject to the Des Moines order. With respect to the milk it sold in the Des Moines area, however, petitioner voluntarily agreed to pay the same price as other Des Moines area milk handlers, so it enjoyed no competitive advantage in that area (Pet. App. a-5 to a-6).

On request of a local dairy cooperative, the Secretary of Agriculture in late 1970 and early 1971 issued a series of three orders amending the Quad Cities—Dubuque Milk Marketing Order. In effect, the amendments eliminated the 34 cent price differential enjoyed by petitioner by virtue of its being governed by the Quad Cities—Dubuque order rather than the Des Moines order (Pet. App. a-6 to a-8).[2]

2. After unsuccessfully challenging the amendments at the administrative level, petitioner filed this action in the United States District Court for the Northern District of Illinois.[3] The district court upheld the amendments, but the court of appeals reversed on the ground that the amendments were not supported by substantial evidence and were therefore unlawful (Pet. App. a-3 to a-19). With respect to

[2] On October 1, 1970, the Secretary issued an order that temporarily eliminated petitioner's 19 cent location differential (Pet. App. a-6). On October 29, 1970, the differential was permanently eliminated, and in addition petitioner was required to pay the additional 15 cent charge that handlers subject to the Des Moines order were then paying (*id.* at a-7). Finally, on April 28, 1971, the additional 15 cent charge was made permanent (*id.* at a-7 to a-8).

[3] The Agricultural Adjustment Act of 1933 specifically provides that handlers may seek judicial review of milk marketing orders. 7 U.S.C. 608c(15)(B).

damages, the court of appeals ruled that petitioner "is entitled to recover overpayments which it made pursuant to the invalid orders" (*id.* at a-18).[4] The court then remanded the case to the district court on the issue of damages, "with direction to enter judgment for [petitioner] in the amount ascertained after appropriate proceedings" (*id.* at a-19).

On remand, the district court entered judgment for petitioner in the amount of $249,978.38. The court arrived at that sum by calculating the quantity of Class I milk purchased by petitioner during the relevant period and multiplying that quantity by the excess price imposed by the invalid amendments (Pet. App. a-19 to a-20). The court did not conduct an evidentiary hearing to determine whether that amount accurately represented the difference between what petitioner had to pay for milk under the invalid amendments and what it would have paid absent the amendments.

On appeal, the Secretary challenged the formula that the district court used to calculate damages. In particular, the Secretary argued that the formula was based on the mistaken assumption that petitioner would have been able to continue buying milk at the old order price for the entire period in question. If, for economic or other reasons, petitioner would have paid more than the minimum price set by the old order, the Secretary argued, then petitioner's over-

[4] The period for which overpayments were made ended in July 1971, when petitioner closed its Des Moines processing plant (Pet. App. a-8).

payments under the invalid amendments should have been correspondingly reduced.

The court of appeals agreed with the Secretary's position. In an unpublished order, the court reversed the judgment of the district court and, because the calculation of overcharges required consideration of "complex economic relationships * * * peculiarly within the special expertise of the Secretary," ruled that these issues should be resolved in the first instance by the Secretary (Pet. App. a-27). Accordingly, the court of appeals instructed the district court to remand the case to the Secretary for the purpose of conducting an evidentiary hearing on the issue of damages.

ARGUMENT

1. Petitioner first argues (Pet. 12-15) that the court of appeals' order to remand the case to the Secretary for the purpose of conducting an evidentiary hearing on the issue of damages conflicts with the court's original decision in the case.

In its first opinion, the court of appeals held only that petitioner was "entitled to recover overpayments which it made pursuant to the invalid orders" (Pet. App. a-18) and that the amount of the overpayments should be "ascertained after appropriate proceedings" (*id.* at a-19). The court did not specify at that time what method should be used to calculate the overpayments or what factors the district court should consider in determining the amount due to petitioner. In its second opinion, the court held that the district court's method of calculating the overpayments was

improper and that, instead, the calculation of the amount due to petitioner required the consideration of "complex economic relationships between producers and handlers during the time period for which damages are sought." Contrary to petitioner's contention, there is no conflict between these two rulings.

Petitioner finds an irreconcilable conflict between the two decisions because it defines "overpayment" the way the district court did: simply as the difference between the minimum price under the old order and the minimum price under the amended order, multiplied by the quantity of milk sold during the period that the amended order was in effect. While that amount constitutes the maximum possible overpayment, it may not represent the true overpayment, as the court of appeals recognized.

The Secretary's marketing orders simply establish minimum prices at which dairies can sell their milk. Economic forces, however, often push prices above these official minimums. Accordingly, it is possible that petitioner would have had to pay increased prices for its milk even if the old marketing order had not been amended. In that event, the true amount that petitioner was overcharged by having to comply with the new marketing order would be less than the theoretical maximum overcharge that was awarded by the district court.[5]

[5] There is an additional reason why petitioner's overpayments may have been less than the district court awarded. As we have noted, when petitioner closed its Rock Island plant, it voluntarily agreed to pay Des Moines prices for milk

The court of appeals likewise did not violate the "law of the case" by instructing the district court to remand the case to the Secretary for an evidentiary hearing on the issue of damages. In its first opinion, the court of appeals instructed the district court to enter an award for damages "in the amount ascertained after appropriate proceedings" (Pet. App. a-19). The "appropriate proceedings" could, of course, have included a further remand to the Secretary if the district court had determined that such a remand was necessary. Accordingly, when the case returned to the court of appeals on the second appeal, and when the court determined that the district court's method of calculating damages was improper, it was entirely consistent with its first opinion for the court of appeals expressly to instruct the district court to remand the case to the Secretary for an evidentiary hearing, a disposition that the court of appeals indisputably had the authority to order. See 28 U.S.C. 2106. At all events, any conflict between the two decisions would be for the court of appeals to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1953).

2. Petitioner argues (Pet. 21-24) that it is automatically entitled to recoup the full difference between

---

purchased for resale in the Des Moines marketing area (Pet. App. a-5 to a-6). This voluntary agreement raises two factual issues: how long the agreement would have remained in effect, and what geographic area was covered by the agreement. These issues bear directly on the amount of petitioner's overpayments under the amended marketing order.

the original and amended market order prices and that the court may not reduce that amount, even if the actual amount that petitioner was overcharged is less than that sum.

Cases involving the recovery of excessive charges occasioned by unlawful rate increases have consistently been held to be governed by normal principles of restitution. See *Atlantic Coast Line Railroad* v. *Florida*, 295 U.S. 301, 310 (1935); *Moss* v. *CAB*, 521 F.2d 298 (D.C. Cir. 1975), cert. denied, 424 U.S. 966 (1976); *Williams* v. *Washington Metropolitan Area Transit Comm'n*, 415 F.2d 922, 942 n.97 (D.C. Cir. 1968), cert. denied, 393 U.S. 1081 (1969). The courts have specifically rejected the claim that a party adversely affected by unlawful rates is automatically entitled to all accounts collected in excess of the last lawful rate. See *Moss* v. *CAB*, *supra*, 521 F.2d at 307 (collecting cases). See also *Atlantic Coast Line Railroad* v. *Florida*, *supra*, 295 U.S. at 314, 318-320; *Williams* v. *Washington Metropolitan Area Transit Comm'n*, *supra*, 415 F.2d at 944 ("[T]he proper disposition on setting aside a rate increase unlawfully ordered by the Commission * * * is to be governed by the equitable considerations which apply to suits for restitution generally * * *. [I]t lies within our authority to direct restitution in an amount less than the whole sum of the increased fares collected under the invalid order * * *").

Petitioner nonetheless contends that these principles have not been applied by this Court in other contexts and that they should not be applied here. In support

of this claim, petitioner relies on cases involving reparations for excess railroad freight charges under the Interstate Commerce Act. See, *e.g.*, *Adams* v. *Mills*, 286 U.S. 397, 407 (1932); *Louisville & Nashville R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 236 (1925). In these cases, the Court held that the defendant railroads could not defeat the shippers' claims for reparations on the ground that the shippers had "passed on" the excess charges to their customers. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 490-491 n.8 (1968). The Third Circuit, in *Abbotts Dairies* v. *Butz*, 584 F.2d 12 (1978), similarly held that a milk handler's damages under an invalid milk marketing order are not subject to reduction to the extent that the milk handler may have passed the excess costs on to its customers. But the present case does not involve the question whether petitioner has suffered any ultimate financial injury as a result of the overcharges—the issue presented by the "passing-on" defense. It involves, instead, the much simpler question of what the true amount of the overcharge was in the first place. Because, as we have noted, the amount of the overcharge may be less than the difference between the invalid minimum price level and the previous valid minimum price level, further proceedings are necessary to ensure that petitioner does not receive more in restitution than it was actually overcharged.

3. Finally, petitioner contends (Pet. 15-18) that by instructing the district court to remand this case to the Secretary of Agriculture for further proceed-

ings, the court of appeals brought itself into conflict with the Third Circuit, in *Abbotts Dairies*, *supra*, and with the District of Columbia Circuit, in *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (1971).

In *Fairmont Foods*, the court of appeals remanded the case to the district court to enter judgment for the milk handler "after appropriate proceedings," just as the court of appeals did in this case. The District of Columbia Circuit did not indicate that a further remand to the Secretary would be improper if the district court considered it necessary, and it did not foreclose its own option later to order such a remand. There is thus no conflict between the decision in *Fairmont Foods* and the decision of the court of appeals in this case.

In *Abbotts Dairies*, the district court ordered the case remanded to the Secretary, but the court of appeals overturned that portion of the district court's order. The ground on which the court of appeals reversed, however, makes it clear that there is no conflict between that decision and this one. The Third Circuit concluded that, unlike the situation in the instant case, there was no need to determine the price at which Abbotts would have been able to purchase milk if the unlawful order had not been issued. The court noted that Abbotts had continued to purchase milk at the price used as a baseline for calculating damages until the day the invalid order went into effect, thus supporting the inference that it would have been able to continue purchasing milk at that price throughout the period in question. See 584 F.2d

at 20-21. Moreover, the court observed that because the order in the *Abbotts Dairies* case affected all milk producers and handlers in the marketing area, determining what the milk prices would have been absent the unlawful order would be extremely difficult. *Id.* at 21. Here, by contrast, the invalid order affected only petitioner, thus making the economic determinations more feasible. Finally, the Third Circuit, concerned with the protracted nature of the litigation in the *Abbotts Dairies* case, determined as a matter of discretion that a remand to the Secretary would add unnecessarily to the delay in reaching a final judgment. That the court of appeals chose to exercise its discretion in this case to remand the case to the Secretary instead of confining further proceedings to the district court does not bring the two decisions into conflict and does not raise a question warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

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Supreme Court, U. S.
FILED
JAN 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-516

Borden, Inc.,

Petitioner,

vs.

Bob Bergland, Secretary of Agriculture,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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January 15, 1979

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Despite the Sophistical Claims by the Secretary to the Contrary, the *Per Curiam* Order Is in Direct Conflict with *Fairmont* and *Abbotts* in Ordering the Case Remanded to the Secretary 3

II. The *Per Curiam* Order Is Also in Direct Conflict with *Fairmont* and *Abbotts* in Holding That the "Damages" in an Overpayments Case Should Not Be the Amount of the Overpayments but May Be Substantially Reduced by So-called "Equitable" Considerations 7

III. The *Per Curiam* Order, in Requiring Remand to the Secretary for an "Evidentiary Hearing" as to the Amount of Borden's "Damages" Is Totally Inconsistent with the Original Decision of the Same Court Holding That Borden's Damages Were Its Overpayments and Ordering the District Court to Determine the Amount; and Thus the *Per Curiam* Order Violates the Doctrine of "Law of the Case" .. 8

IV. The Secretary Continues to Ignore the Historical and Logical Differences between the Remedies of Repayment of Unlawful Overcharges and of Equitable Restitution 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — Page

Abbotts Dairies Division of Fairmont Foods Co. v. *Butz*, 584 F.2d 12 (3rd Cir. 1978) ..... *passim*

Abbotts Dairies Division of Fairmont Foods Co. v. *Butz*, 438 F.Supp. 629 (E.D. Pa. 1977) 2, 5

Atlantic Coast Line v. *Florida*, 295 U.S. 301 (1935) 10

Borden, Inc. v. *Butz*, 544 F.2d 312 (7th Cir. 1976) 1, 7, 8

Fairmont Foods Co. v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971) ..... *passim*

Moss v. *C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975) . 10

Nader v. *Allegheny Airlines*, 426 U.S. 290 (1976) 4

Williams v. *Washington Met. Area Transit Com'n*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969) 10

STATUTES

Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §608c) 2, 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-516

Borden, Inc.,

Petitioner,

vs.

Bob Bergland, Secretary of Agriculture,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

WHAT THIS CASE IS ABOUT

Despite the attempt by the Brief in Opposition ("Brief") to obscure this essential conclusion, there is an irreconcilable conflict between the decision below and *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971) and *Abbotts Dairies Division of Fairmont Foods* v. *Butz*, 584 F.2d 12 (3rd Cir. 1978). Both of the latter cases hold that where illegal overpayments are made because of orders of the Secretary of Agriculture ("Secretary") which are judicially determined to be invalid, the *overpayments* are the milk handler's damages and are to be ascertained by the district court and not by the Secretary. That was also the holding of the Court of Appeals for the Seventh Circuit in its *initial* decision in this case, *Borden, Inc.* v. *Butz*, 544 F.2d 312 (7th Cir. 1976).

On remand to the district court after the initial appeal, Borden moved for summary judgment, pointing to record

evidence showing fully the amounts of the overpayments. No relevant evidence raising an issue of fact as to the amounts was pointed out or advanced by the Secretary; and therefore the district court entered judgment for Borden. On appeal the Court of Appeals changed its mind, and, in a *per curiam* and unreported "Order," and without an opinion explaining its action, ruled that the remand to the district court for computation of overcharges was an improper procedure and that the proper "procedure" was that adopted by the district court for the Eastern District of Pennsylvania in *Abbotts Dairies* v. *Butz*, 438 F.Supp. 629, 636 (E.D. Pa. 1977). In that case the district court ordered the computation of "damages" to be sent back to the Secretary who was to hold a hearing on a wide range of "economic" issues supposedly relevant to that issue.

A few weeks after the *per curiam* Order of the Seventh Circuit was issued here, the Court of Appeals for the Third Circuit reversed the decision of the district court on which the Seventh Circuit had based its ruling. *Abbotts Dairies* v. *Butz*, 584 F.2d 12 (1978). The Third Circuit held, consistent with, and citing both *Fairmont* and the initial decision of the Seventh Circuit *in this case*, that determining the amount of overcharges was for the district court, and not for the Secretary. Nevertheless, on being advised of the action of the Third Circuit, the Seventh Circuit refused to reconsider its *per curiam* Order here.

After Borden's Petition for certiorari was filed in this case, the Secretary announced his decision not to file a petition for certiorari with respect to *Abbotts*. This failure to appeal *Abbotts* is flagrantly incompatible with his opposition to the grant of Borden's Petition here. Obviously, if the court in *Abbotts* wrongly decided a major matter affecting the administration of the Agricultural Adjustment Act, 7 U.S.C. §601 *et. seq.*, ("Act"), he had a duty to appeal it. And, if *Abbotts* was rightly decided, then the *per curiam* Order here was wrong.

Why then does he oppose review of the *Borden* decision while not seeking review of *Abbotts*? The answer is clear. The Secretary opposes review simply because he does not want the Court to give a final decision on a major issue with respect to the administration of the Act and because he fears that such a ruling will foreclose him from frustrating justice in future cases by the same procedural tactics he has used in this and other cases.

Nothing said in the Secretary's Brief in any way answers or meets the reasons given in Borden's Petition why the Court should review this case, resolve the glaring conflict between the several Courts of Appeals, and finally decide what the Secretary has always claimed is an important question in the administration of the Act.

I. Despite the Sophistical Claims by the Secretary to the Contrary, the *Per Curiam* Order Is in Direct Conflict with *Fairmont* and *Abbotts* in Ordering the Case Remanded to the Secretary

Clearly the *per curiam* Order, in holding that the determination of overpayments must be made by the Secretary rather than by the district court, is in direct conflict not only with the initial decision of the Seventh Circuit here but also with *Fairmont* and *Abbotts*. The Secretary's Brief seeks to deny the existence of the conflict by the most specious of arguments.

As to *Fairmont*, the Secretary argues at p. 11 of his Brief:

> "The District of Columbia Circuit did not indicate that a further remand to the Secretary would be improper if the district court considered it necessary and it did not foreclose its own option later to order such a remand. There is thus no conflict. . . ."

But in *Fairmont*, even on this strained interpretation, the district court had at least the discretionary right to make the determination without further remand, while the *per curiam* Order here made remand to the Secretary mandatory. Thus, the two rulings are irreconcilable, even on the Secretary's

reading of them. More importantly, what the Court said in *Fairmont* was:

> "In view of the ease with which payments can be made once determined, we remand to the District Court on the issue of damages, with direction to enter judgment for appellant in the amount ascertained after appropriate proceedings." 442 F.2d at 773.

No candid reader of this passage could possibly believe that the Court contemplated anything other than "appropriate proceedings" in the district court.

The Secretary's argument assumes that the *Fairmont* remand would have permitted the district court to send the case back to the Secretary. Nothing, however, in *Fairmont* hints at a right in the district court to order this. Under the primary jurisdiction doctrine, the issue was *either* for the court *or* the Secretary, and could not possibly have been within the jurisdiction of both. The fact that the case was remanded to the court instead of the Secretary confirms that under *Fairmont* the ascertainment of damages was considered a matter for the court. The conflict between the *per curiam* Order and the decision of the Third Circuit in *Abbotts* is, if possible, even more direct. In *Abbotts*, the court specifically considered and *rejected* the claim that the primary jurisdiction doctrine permitted or required remand to the Secretary to calculate damages.[1] This conclusion is irreconcilable with the *per curiam* Order here. Nevertheless, the Secretary pretends that this case and *Abbotts* can be distinguished:

> "The Third Circuit concluded that, unlike the situation in the instant case, there was no need to determine

[1] "The provision conferring jurisdiction to the Secretary, 7 U.S.C. § 608c(15)(A), does not provide any specific indication that the Secretary may go beyond the determination initially of the validity or scope of a marketing order. In any event the issues left to be decided in this case are not of the kind which are peculiarly within the expertise of the Secretary and which might otherwise justify resort to the administrative process. *See Nader v. Allegheny Airlines*, 426 U.S. 290, 305–06, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976)." 584 F.2d at 20, n.16.

> the price at which Abbotts would have been able to purchase milk if the unlawful order had not been issued. The court noted that Abbotts had continued to purchase milk at the price used as a baseline for calculating damages until the day the invalid order went into effect, thus supporting the inference that it would have been able to continue purchasing milk at that price throughout the period in question." (Brief, p. 11).

But Borden also had purchased its milk at the lawful minimum price, thus permitting the same inference.

The Secretary quotes the Seventh Circuit, arguing that "the calculation of the amount due to petitioner required the consideration of 'complex economic relationships between producers and handlers during the time period for which damages are sought.' " (Brief, p. 7).[2] The Secretary argues that it is possible that Borden "would have had to pay increased prices for its milk even if the old marketing order had not been amended." (Brief, p. 7). This is nothing more than a recycled version of the Secretary's longstanding argument that Borden could not have obtained adequate supplies at the lower prices in effect prior to the unlawful orders. That argument, however, was totally demolished by the Court of Appeals in its initial decision (544 F.2d at 316–17), and no hearings on "complex economic relationships" should be permitted for the purpose of repeated advancement of this same

[2] The statement quoted by the Secretary from the Seventh Circuit's *per curiam* Order paraphrases an earlier quotation in the Order from the reversed district court opinion in *Abbotts*. The *per curiam* Order quoted the district court in *Abbotts* as saying:

> "The determination of . . . [damages] obviously will require evaluation of complex economic relationships between producers and handlers during the time period for which damages are sought. Such matters are peculiarly within the special expertise of the Secretary." (App. p. 27)

It is ridiculous for the Secretary thus to acknowledge that the very rationale of the Seventh Circuit's *per curiam* Order was based on the district court opinion in *Abbotts* and at the same time to deny that the reversal of that opinion by the Third Circuit creates no conflict.

untrue, unfounded, and already rejected claim. *See* Borden's Petition, p. 10.[3] The attempted distinction between *Abbotts* and this case is thus a false one. Facts discussed extensively in the initial opinion of the Court of Appeals refuted the false claim that higher prices were necessary to assure supplies at Borden's plant and support "the inference that [Borden] would have been able to continue purchasing milk at that price", just as clearly as any such inference was supported in *Abbotts*. Indeed, in Borden's case, the inference is strengthened by the fact that the Secretary in answer to Borden's motion for summary judgment, failed to show the existence of evidence sufficient to create a genuine issue as to this point.[4]

The Secretary has thus been unable to advance any respectable reason why the *per curiam* Order of the Seventh Circuit is not directly in conflict with the rulings of the Third Circuit and the District of Columbia Circuit.

[3]In a footnote at p. 7 of his Brief, the Secretary also refers to certain voluntary payments made by Borden to its supplier prior to the imposition of the invalid orders as raising factual issues appropriate for an evidentiary hearing. In the month prior to the illegal orders, Borden had voluntarily paid its supplier an additional 15 cents per cwt. above the Order price on approximately a quarter of the milk that it purchased. (Borden's total overpayments on all of its milk as a result of the illegal orders amounted to 34 cents per cwt.) The district court concluded, as a matter of law, that Borden's recovery should not be reduced on the theory urged by the Secretary that these payments would have continued notwithstanding the illegal orders. However, even if this question was wrongly decided by the district court, the amounts involved are very small and could be readily ascertained from the record without the necessity of any hearing before the Secretary. The question raised is a judicial—not an administrative—one.

[4]An additional conflict exists between the *per curiam* Order and *Abbotts*. On remand after the initial appeal, the district court awarded Borden almost $100,000 in interest on its overpayments. In reversing, the *per curiam* Order of the Seventh Circuit stated that the Secretary should determine "whether interest shall be added." Directly conflicting with this holding is the ruling by the Third Circuit in *Abbotts* that the issue of interest "must" be considered by the district court. 584 F.2d at 21, n.21.

II. The *Per Curiam* Order Is Also in Direct Conflict with *Fairmont* and *Abbotts* in Holding That the "Damages" in an Overpayments Case Should Not Be the Amount of the Overpayments but May Be Substantially Reduced by So-called "Equitable" Considerations

As explained in Borden's Petition at pp. 12–13, the *per curiam* Order abandoned the definition of Borden's damages as the "overpayments which it made pursuant to the invalid orders" (544 F.2d at 319), and by citing and quoting from the district court's opinion, *Abbotts* would allow the Secretary to apply the principles of equitable restitution to reduce, offset or wipe out the actual overcharges. Here, again, the *per curiam* Order was in direct conflict with *Fairmont* and *Abbotts*.

Fairmont held, as did the initial opinion in this case, that "as to damages, we think Fairmont is entitled to recover overpayments which it made pursuant to this invalid Order"—whereas the *per curiam* Order would permit the Secretary to reduce or eliminate the overpayments if he found reason to feel that refund of them would be "inequitable."

Even more important, the *per curiam* Order is in direct conflict with the result reached in *Abbotts*. Even though the latter was begun purely as a "restitution" case, the Third Circuit said:

> "In view of these circumstances, the producers who received overpayments did, we believe, receive enrichment in the form of excessive and unlawful prices, though they were certainly not at fault for the actual issuance of the Secretary's order. Equitable restitution to Abbotts to the extent of the monies in the producer-settlement fund reserve is therefore appropriate in our view. Denial of restitution on the facts presented here would virtually remove any possibility of recovery of overpayments due to invalid milk pricing orders." 584 F.2 at 20.

This reasoning in denying the relevance and admissibility

of "equitable considerations" in that type of case is directly contradictory to the *per curiam* Order here, since the *per curiam* Order encourages the Secretary to defeat or reduce refund of the overpayments on such grounds.

III. The *Per Curiam* Order, in Requiring Remand to the Secretary for an "Evidentiary Hearing" as to the Amount of Borden's "Damages" Is Totally Inconsistent with the Original Decision of the Same Court Holding That Borden's Damages Were Its Overpayments and Ordering the District Court to Determine the Amount; and Thus the *Per Curiam* Order Violates the Doctrine of "Law of the Case"

The initial decision of the Seventh Circuit stated:

> "As to damages, Borden is entitled to recover overpayments which it made pursuant to the invalid orders . . . [W]e remand to the district court on the issue of damages, with direction to enter judgment for Borden, in the amount ascertained after appropriate proceedings." 544 F.2d at 319–20.

The Court cited the passage from *Fairmont*, where the District of Columbia Court of Appeals had used almost identical language in remanding to the district court. Both opinions thus necessarily hold that hearings by the Secretary on the simple issue of computing the amount of the overpayments were totally inappropriate. The remand on the first appeal, based on that ordered in *Fairmont*, mandated the *district court* to determine the overpayments, while the *per curiam* Order prohibited the district court from doing so. The two decisions of the Seventh Circuit in the same case are totally incompatible.

The Secretary's sole answer to this point is that sending the case back to the Secretary by the district court would have been an "appropriate procedure" for the latter to have adopted within the terms of the initial remand (Brief, p. 8). This argument is self-defeating. Even if sending the case to

the Secretary had been an appropriate option under the original remand, it was at most a decision for the district court to make at its discretion; and no reason was advanced by the Seventh Circuit why the district court's election to hold the hearing itself was an abuse of discretion. Even more important is the fact that if remand to the Secretary were now an "appropriate" remedy because of the primary jurisdiction doctrine, it should have been ordered on the initial appeal. By ordering damages to be determined by the district court, the Court was necessarily holding that this matter was not one requiring administrative expertise, but was a judicial matter to be decided by the district court.

With respect to the measure of damages, the Seventh Circuit also reversed itself. Contrary to its first opinion, which held that Borden was entitled to recover "overpayments," the *per curiam* Order mandated a determination of "damages" through a procedure following that of the district court n *Abbotts*. As pointed out earlier, this remand permitted the Secretary to award much less than the total overpayments. Under the *per curiam* Order, damages therefore are *not* to be equated with "overpayments" as the initial decision held.

The initial order of remand properly held that Borden's damages were no more, no less, than the amount of the overpayments. The *per curiam* Order violated good judicial administration by repudiating its initial decision. The weak and fallacious reasoning of the Secretary's Brief cannot obscure the fact that the *per curiam* Order flies in the face of the "law of the case" doctrine.

IV. The Secretary Continues to Ignore the Historical and Logical Differences between the Remedies of Repayment of Unlawful Overcharges and of Equitable Restitution

The Secretary reiterates (p. 9) his mistaken argument that recovery of "excessive charges occasioned by unlawful rate increases" can only be recovered by invocation of the equitable

remedy of restitution; he persists in ignoring the established legal right to recover unlawful overcharges as damages for a tort—a remedy sounding in law rather than equity. The distinction is pointed out at pp. 22–24 of Borden's Petition. The line of "restitution" cases cited and relied on by the Secretary[5] (Sec. Br. p. 9) were discussed and found irrelevant in *Abbotts*. 584 F.2d at 19–20.

CONCLUSION

The great importance of the issues presented here to the administration of the Milk Market system was admitted by the Secretary in proceedings below and is confirmed by the recent decisions of three Courts of Appeals dealing with them. Though respondent denies that any conflict exists between the Circuits, the Seventh Circuit here relied, for the *exclusive* rationale of its Order, on a district court opinion subsequently reversed by the Third Circuit. This, combined with the fact that the Seventh Circuit declined to rehear this case when reversal of that decision was brought to its attention, emphasizes the conflicts.

Respondent is within its rights in deciding not to seek certiorari in the *Abbotts* case. However, respondent's desire to avoid a definitive resolution of the damages issues presented by invalidation of the Secretary's Market Orders should not be permitted to result in blatantly unequal treatment of milk handlers whose cases were decided in different Circuits. Almost nine years after the discriminatory and illegal orders were imposed by the Secretary which had the effect of raising the Order prices applicable to Borden by known, discrete amounts, denial of certiorari would leave Borden still far away from actually recovering its overpayments. Unlike *Abbotts*, which is finally receiving a speedy resolution of its

[5] *Atlantic Coast Line Rd.* v. *Florida*, 295 U.S. 301, 310 (1935); *Moss* v. *CAB*, 521 F.2d 298 (D.C. Cir 1975); *Williams* v. *Washington Met. Area Transit Com'n*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

damages claims by the district court at the explicit direction of the Third Circuit, Borden can recover its overpayments only if it has the tenacity to endure protracted evidentiary proceedings before the same biased agency that imposed the illegal orders in the first place and then to pursue additional appeals in the courts from the inevitably discriminatory rulings to be expected from the Secretary, as his Briefs foreshadow. Such an "administration of justice" in a manner intended to defeat substantial rights of the parties should not be tolerated. This principle was clearly recognized in *Abbotts* and should be applied here as well.

For the foregoing reasons and for the reasons stated in Borden's Petition, certiorari should be granted.

Respectfully submitted,

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